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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 663.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellants,*

v.

CAPITAL TRANSIT COMPANY, ET AL., *Appellees.*

**BRIEF ON BEHALF OF THE STATE CORPORATION
COMMISSION OF THE STATE OF VIRGINIA, AP-
PELLEE, AND THE NATIONAL ASSOCIATION
OF RAILROAD AND UTILITIES COMMISSIONERS,
AMICUS CURIAE.**

HENRY E. KETNER,
*Attorney for said State Corpo-
ration Commission,*
State Office Building,
Richmond, Va.

FREDERICK G. HAMLEY,
Attorney for said Association,
7409-7415 New Post Office
Building, Washington, D. C.

April 16, 1945.

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Opinions Below.

The opinions of the District Court of the United States for the District of Columbia (R. 912-942), are reported in 55 F. Supp. 51 and 56 F. Supp. 670. The opinions of the Interstate Commerce Commission (R. 835, 813), are reported in 256 I. C. C. 769 and 258 I. C. C. 559.

Preliminary Statement.

The State Corporation Commission of the State of Virginia, hereinafter referred to as the "Virginia Commission," is an agency of state government of the State of

Virginia, existing under the provisions of the laws of the State of Virginia and having jurisdiction over motor carriers and street railways operating within the State of Virginia.

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association," is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States except two, one of which has no state regulatory commission.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of the Association by direction of the President in the general public interest.

Statement of the Case.

This is an appeal from a final decree of the District Court of the United States for the District of Columbia, setting aside and permanently enjoining an order of the Interstate Commerce Commission, hereinafter referred to as the "Commission," prescribing reduced passenger fares and joint fares applicable to transportation between the District of Columbia and certain government installations in nearby Virginia.¹ The carriers involved are The Capital Transit Company, the Alexandria, Barcroft and Wash-

¹ These installations hereinafter collectively referred to as the "Virginia installations", are the Pentagon Building, the Navy Arlington Annex, the Army Air Force Annex at Gravelly Point, and the Washington National Airport, all located in Virginia within a radius of 2.5 miles from the Virginia end of the 14th Street Highway Bridge across the Potomac River. (R. 913-914.)

ington Transit Company, the Arlington and Fairfax Motor Transportation Company, and the Washington, Virginia & Maryland Coach Company.²

The Transit Company furnishes regular urban and suburban street car and bus service for the transportation of passengers in the District of Columbia, sometimes referred to herein as the "District," and nearby Maryland. It also operates a street car line within the District which has its outbound terminal in Virginia at the south end of Francis Scott Key Bridge across the Potomac River, and two bus lines between the downtown business section of the District and the Pentagon Building. One of the Transit Company's bus lines which serves the Pentagon Building is operated over the Arlington Memorial Bridge, hereinafter referred to as the "Memorial Bridge," with its District terminal located at 19th and C Streets, N. W. The other bus line serving the Pentagon Building is operated over the 14th Street Highway Bridge, hereinafter referred to as the "Highway Bridge," with its District terminal located at 7th Street and Constitution Avenue, N. W. (R. 838).

The Virginia Lines render intrastate motor carrier passenger service in the State of Virginia subject to the regulatory jurisdiction of the Virginia Commission. The Virginia Lines also render interstate motor carrier passenger service between designated terminals in the downtown business section of the District, on the one hand, and points in Virginia, on the other. (R. 837). This interstate service includes, to the extent more particularly described in the briefs of the other appellees, service between the District and the four government installations. The Arlington Line and the Alexandria Line also perform intrastate service within the District, as set out more fully in the body of this brief.

² Hereinafter referred to respectively as the "Transit Company", "Alexandria Line", "Arlington Line", and "Coach Company". The latter three companies are herein sometimes referred to collectively as the "Virginia Lines."

A uniform one-way interstate fare of 10 cents is maintained by the Virginia Lines between their District terminals and all points in zones ranging from 6.5 to 8 miles in extent, including the Virginia installations, with the single exception that the Alexandria Line sells a book of 26 tickets for \$1.95 or 7.5 cents each, which are good for transportation between its District terminal and the Army Annex. (R. 839).

The fare on the Transit Company's bus routes operating between the District and the Pentagon Building is 5 cents each way, said company continuing to charge the regular fare for intrastate transportation on its street railway and bus lines in the District. (R. 838). This regular fare for Transit Company transportation within the District is a cash fare of 10 cents, 3 tokens for 25 cents, or a weekly pass for \$1.25. These regular fares do not apply on the Transit Company's suburban service into nearby Maryland. A zone fare of from 5 to 20 cents applies beyond the District line. (R. 840). There are no joint fares or transfer arrangements between the Transit Company and the Virginia Lines.

On April 27, 1943, the Secretary of War wrote to the Commission, complaining that the fares charged by these four carriers for bus service between the District and the Virginia installations were excessive. Thereafter, on July 3, 1943, the Commission issued an order instituting a proceeding docketed as No. 28991 and entitled, "Passenger Fares Between District of Columbia and Nearby Virginia." The four carriers were made respondents in that proceeding. A hearing was thereafter held in Docket No. 28991, at which time the Virginia Commission intervened and became a party to the proceeding.

Upon the commencement of the hearing several of the appellees orally moved that the proceeding be discontinued for the reason that the bus operations in question of the Virginia Lines were, by reason of section 203(b) (8) of the Interstate Commerce Act, hereinafter referred to as the

"Act," exempt from the Commission's rate regulatory jurisdiction. (R. 3). In the alternative, some of the appellees moved that, if the Commission denied the motion respecting the question of jurisdiction, then in that event the proceeding be referred to a properly constituted Joint Board for a hearing and recommendation pursuant to section 205(a) of the Act. The presiding Commissioner referred the motions to the full Commission. He thereafter announced, during the course of the hearing, that the full Commission had denied the motion to refer the proceeding to a Joint Board and had deferred ruling upon the motion respecting jurisdiction until the record was completed. (R. 6, 7).

On January 18, 1944, the Commission (three Commissioners dissenting) issued its report and order in Docket No. 28991. (R. 835). By this report and order the Commission purported to require that the Transit Company and the Virginia Lines establish, maintain and apply to the transportation of passengers between points in the District, on the one hand, and the Virginia installations, on the other hand, other and different fares than those presently in effect, as described above. By this report and order the Commission also purported to require that the Virginia Lines establish joint fare arrangements with the Transit Company. The effect of this report and order, if it became effective, would be to reduce substantially the fares of all four carriers for service between the District and the Virginia installations. (R. 839, 850, 851).

On February 14, 1944, the Commission denied a petition for reconsideration duly filed by the carriers and the Virginia Commission. The matter was then brought on for review before a three-judge district court in the District of Columbia, and that court set aside the Commission report and order. (R. 912-921). The Commission thereupon reopened the proceeding for further hearing and reconsideration and on June 12, 1944, entered a supplemental report and order (two Commissioners dissenting)

reaffirming its original order. (R. 813). The appellees then brought the matter again before the three-judge district court³ and that court (Judge Arnold dissenting) entered an order setting aside the Commission's supplemental report and order. (R. 942-953). The United States of America and the Commission thereupon instituted this appeal.

Summary of Argument.

I. (Pages 9-44). Two of the four carriers, the Arlington and the Alexandria Lines, are exempt from Commission rate regulation, under Section 203(b) (8) of the Act. The service in question of these two lines is performed entirely within the Washington, D. C. Commercial Zone, as determined by the Commission in 3 M. C. C. 243. Their operations also meet the requirements of the proviso to Section 203(b) (8), which limits the exemption to carriers lawfully engaged in intrastate transportation over the entire length of their interstate routes. The Commission's determination, under Section 203(b) (7a), that federal regulation is necessary in order to carry out the national transportation policy, is not supported by adequate findings. There is no finding that the national transportation system is in any way affected nor a finding that the objectives of the national transportation policy can be attained only by federal regulation. The Commission's legal conclusion that local authorities are constitutionally inhibited from regulating this commerce is disapproved by this Court's decision in *Port Richmond Ferry Co. v. Board of Chosen Freeholders*, 234 U. S. 317, and other cases. The Commission order is not severable as between the carriers and, being null and void as to the Arlington and Alexandria Lines, should be declared void as to all four carriers.

³ The original three-judge court was comprised of Circuit Judge Miller and District Judges Bailey and Letts. When the matter came before the court for the second time, Circuit Judge Arnold was, by stipulation, substituted for Judge Miller who was absent from the District.

II. (Pages 45-50). The Commission failed to refer this matter to a Joint Board for appropriate proceedings, as required by Section 205(a) of the Act. That section requires all "complaints as to rates, fares and charges of motor carriers" to be referred to a Joint Board where not more than three states are involved. This matter was initiated by the filing of an informal complaint. At the Commission hearing customary complaint procedure was followed. The statutory requirements could not be avoided or circumvented by Commission action in designating the proceeding an "investigation." Failure to refer the matter to a Joint Board is a fatal jurisdictional defect.

III. (Pages 51-54). The Commission order requires the Transit Company to render intrastate transportation service to holders of interstate weekly passes. This is a clear violation of Section 202(b), forbidding the Commission to interfere with the exclusive exercise by each state (including the District of Columbia) of the power of regulation of intrastate commerce by motor carriers. It also violates Section 216(e) of the Act, prohibiting the Commission from prescribing, or in any manner regulating, the rates, fares, or charges for intrastate transportation, or any service connected therewith. The Commission action will have far-reaching effects diametrically opposed to the plain and expressed intention of Congress.

IV. (Pages 54-62). The Commission order prescribes rates which are preferential, discriminatory and prejudicial to persons and localities in Virginia. If the prescribed rates become effective, persons residing in Virginia who are employed in the District of Columbia, will be required to pay higher fares than persons residing in the District who are employed at the Virginia installations, who ride in the same vehicles for the same or less distances. Such a result is expressly forbidden by Section 216(d) of the Act. In addition, to being discriminatory, this discrepancy in fares will place a burden on intrastate commerce in Virginia by requiring intrastate passengers to make up

the deficiency in revenue created by the reduction of fares to a special class of passengers traveling interstate between the District and the Virginia installations.

V. (Pages 63-77). The Transit Company is a street railway company. *Depreciation Charges of W. Ry. & E. Co.* 85 I. C. C. 126, and other cases. Street railway companies are not subject to Commission jurisdiction. *Omaha & C. R. Street R. Co. v. Inters. Com. Com'n.*, 230 U. S. 324. Enactments subsequent to the *Omaha case* did not bring street railroads under the rate jurisdiction of the Commission. Up until the instant case the Commission has uniformly distinguished between street railways and interurbans and, relying on the *Omaha case*, has consistently held street railways to be excluded from Commission jurisdiction. The Commission contention that there has been a co-mingling of street car and bus operations and, as a result, the Commission has been vested with jurisdiction over the Transit Company's street car operations, has no foundation in either fact or law. The doctrine announced in the *Wisconsin Railroad Commission case*, 257 U. S. 563, relied upon by the Commission, has no application here. The definition of "motor vehicle," in Section 203(a) (13) of the Act, expressly negatives the idea that the Commission can obtain jurisdiction over street cars under Part II of the Act.

Argument.

I.

Section 203(b) (8) of the Act exempts the Arlington Line and the Alexandria Line from Interstate Commerce Commission Jurisdiction.

Section 203(b) (8)⁴ specifically exempts certain bus operations, carried on within a so-called commercial zone, from rate regulation by the Commission. The Commission has established such a zone in the Washington, D. C. area. *Washington, D. C. Commercial Zone*, 3 M. C. C. 243. The operations in question of the Arlington Line and the Alexandria Line are conducted wholly within that zone.

* All statutory references are to the Interstate Commerce Act unless otherwise indicated. In the U. S. Code, title 49, the section numbers are 100 higher, the above sub-section being found at 49 U. S. C. 303 (b) (8). The pertinent portion of this sub-section, including paragraph (7a) which immediately precedes paragraph (8), reads as follows:

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (7a) * * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, *and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction.*" (Emphasis supplied)

In a double-barrelled attempt to negate this exemption, the Commission made two rulings. *First*, the Commission held that the exemption did not apply for the reason that the appellee carriers were not engaged in the intrastate transportation of passengers over the entire length of their interstate routes. A proviso of section 203(b) (8), shown in italics in the footnote, makes such intrastate operation a condition precedent to the attaching of the exemption. *Second*, the Commission found that, if the exemption did apply, then the operations in question should be removed from the exemption for the reason that application of the Act to such operations "is necessary to carry out the national transportation policy." Authority to remove bus operations from such exemption by making this kind of finding is contained in Section 203(b) (7a).

The Court below held against the Commission on each of these points. In fact, the Court below disposed of the case upon a consideration of these two jurisdictional questions pertaining to Section 203(b) (7a) and (8), and did not pass upon the numerous other points which were raised by the appellees. In so doing the Court held that the exemption under Section 203(b) (8) applied to all four appellee carriers. In conformity with the position taken by the Virginia Commission in the Court below, we will confine our argument on this phase of the case to the validity of the Commission's rulings as respects the operations of the Arlington Line and the Alexandria Line. It is our position, however, that if the order is null and void as to these two carriers, because exempt under Section 203(b) (8), the order should be held null and void as to all the appellees.⁵ The two points referred to

⁵ Under the review procedure provided by the Urgent Deficiencies Act (38 Stat. L. 219, 220, 28 U. S. C. 41 (28)), the court may enjoin, set aside, annul, or suspend *in whole or in part* any order of the Interstate Commerce Commission." (Emphasis supplied) Thus the Court has discretionary power to void the entire order or only parts thereof. A consideration of this order indicates, however, that it deals with all four carriers as a group, and that the

above, both pertaining to the exemption provisions of Section 203(b) (7a) and (8), will be separately discussed below.

(a) **THE ARLINGTON LINE AND THE ALEXANDRIA LINE ARE ENGAGED IN THE INTRASTATE TRANSPORTATION OF PASSENGERS OVER THE ENTIRE LENGTH OF THEIR INTERSTATE ROUTES, WITHIN THE MEANING OF SECTION 203 (B) (8).**

It is conceded by all parties that the Arlington Line and the Alexandria Line have full intrastate rights over their respective interstate routes in Virginia, and are exercising those rights. But the Commission found that this was not the case with respect to that portion of the interstate routes lying in the District of Columbia. In its original report of January 18, 1944, the Commission made the following finding:

" . . . Under authority of the District Commission, the Alexandria and Arlington Lines perform certain intrastate transportation between a limited number of points in the District, but they are not authorized to render general urban service between all District points along their lines." (R. 839).

" . . . the other Virginia Lines (the Arlington and Alexandria Lines) have only limited intrastate rights in the District and do not engage in intrastate transportation between all points along their lines in the District . . . In view of the fact that the Arlington and Alexandria Lines perform only restricted intrastate transportation in the District it is *reasonably clear*

order is not severable as between the carriers. The Commission took the entire transportation situation affecting the Virginia installations into consideration, and reached its conclusions on the basis of the overall situation. The Commission found that through routes existed between the Transit Company and the Virginia Lines. (R. 850.) It ordered that joint fares be established, including the use of ticket books and the issuance of transfers. (R. 851.) What the Commission might have done if only the Transit Company and Coach Company were before it, cannot possibly be determined from a reading of the orders. This being the case, the Court, in the exercise of its discretion, ought to void the order as to all carriers.

that their fares between the Virginia installations and the District are subject to our jurisdiction . . . " (R. 843) (Emphasis supplied)

After the Court below had held that the Commission misconceived the law in making this finding and the alternative ruling that application of the Act is necessary in order to carry out the national transportation policy, the Commission held a further hearing and issued its "Supplemental Report" of June 12, 1944. (R. 813). Finding the Court disposed to let the case turn on the jurisdictional question raised by Section 203(b) (7a) and (8), the Commission's Supplemental Report no longer voices a doubt as to the application of the exemption, such as was manifestly displayed in the original report. Now the Commission rules inapplicability of the exemption to be absolutely certain—not "reasonably clear". (R. 822, 825).

In the Supplemental Report, the Commission based its ruling that the Arlington and Alexandria Lines are not engaged in intrastate operations in the District of Columbia throughout the entire length of their interstate routes, upon two grounds, namely: (1) These lines have only limited intrastate rights within the District of Columbia over their Highway Bridge routes; and (2) Buses operating over the Memorial Bridge are not permitted to perform intrastate service within the District of Columbia.⁶

⁶ In support of this ruling, the Supplemental order (R. 822), also cites a number of Commission cases wherein it is asserted the Virginia Lines admitted the Commission's jurisdiction by applying for and receiving various authority from the Commission. None of these cases involve the Alexandria Line and the only cases which involve the Arlington Line are those to be found in 8 M. C. C. 573, 18 M. C. C. 267, and 25 M. C. C. 763. When those cases were current, the Arlington Line was not exempt under Section 203(b) (8), because its line extended beyond the Washington, D. C. Commercial Zone. (See footnote at 25 M. C. C. 763.) As a result of the Commission's decision in the last of these cases, decided August 8, 1939, the Arlington Line withdrew from operations in Fairfax County and confined itself entirely to the Washington, D. C., commercial Zone. In any event it is well settled that the Commission has only

- (1) *The Commission ruling that the Section 203(b) (8) exemption does not apply because the Arlington and Alexandria Lines have only limited intrastate rights within the District of Columbia, over their Highway Bridge routes.*

On this point the Supplemental Report states:

"Over the Highway Bridge routes they are also not authorized to engage in such transportation, (intrastate transportation) except between authorized stopping points one on in-bound and one on out-bound movements, opposite the Jefferson Memorial, and authorized stops north of Maine Avenue. *In other words, the companies are prohibited from engaging in any intra-District transportation in the area north of Maine Avenue.* The distance between the intersection of Fourteenth Street and Maine Avenue, S. W., and the terminal of the Alexandria Line at Twelfth Street and Pennsylvania Ave., N. W., is about 1 mile over the route of that company. The only authorized stops south of Maine Avenue are those opposite the Jefferson Memorial." (Emphasis supplied) (R. 821-822).

The italicized portion of the above finding is clearly in error, as an examination of the orders of the Public Utilities Commission of the District of Columbia, hereinafter called the "Public Utilities Commission" or "P.U.C.", will clearly show. Under P.U.C. Order No. 2508, issued February 23, 1943, (Ex. 107; R. 781, 1049), the Arlington Line is authorized, on an inbound trip, to make five stops, after crossing the Highway Bridge, in addition to the terminal stop at 12th Street, N. W. and Pennsylvania Avenue. The first of these stops on an inbound trip is on 14th St. S. W., opposite the Jefferson Memorial. This is very close to the north end of the Highway Bridge. On such

such power and jurisdiction as Congress has conferred upon it, and cannot acquire jurisdiction by consent, default or otherwise. *A. T. & S. F. Ry. Co. v. U. S.*, 284 U. S. 248; *U. S. v. Chi. M. St. P. & P. R. Co.*, 282 U. S. 311; *N. Y. Cent. Secur. Corp. v. U. S.*, 287 U. S. 12.

inbound trips the Arlington Line is authorized, under its P.U.C. permit, to receive passengers at the Jefferson Memorial stop, and to discharge them at any one of its other five stops, including the terminal, enroute to its terminal at 12th Street, N. W., and Pennsylvania Avenue.

On outbound trips, the Arlington Line is authorized to make three stops after leaving its terminal and before crossing the Highway Bridge. The last of these stops is on 14th St. S. W., opposite the Jefferson Memorial. The Arlington Line is permitted, on such outbound trips, to receive passengers at its terminal or the first two stops after leaving the terminal, and to discharge them at the Jefferson Memorial stop.

Thus the Arlington Line is authorized to render intrastate service throughout the entire length of its Highway Bridge route within the District of Columbia. Moreover, the Arlington Line actually engages in such intrastate commerce, from its terminal at 12th Street, N. W. and Pennsylvania Ave., to 14th St. S. W., opposite the Jefferson Memorial, near the north end of the Highway Bridge (R. 1050). The same is true with respect to the Alexandria Line, under authority of P.U.C. Order No. 2507, issued February 23, 1943, (Ex. 108, R. 781, 1052). The only difference is that the Alexandria Line has four stops, inbound, including its terminal, and the same number outbound.

It is true that on an inbound trip, neither the Arlington nor Alexandria Line can *receive* passengers after leaving the Jefferson Memorial stop. But passengers who were received at the Jefferson Memorial stop may be discharged at the other stops enroute to the respective terminals, and at the terminals themselves. It is also true that on outbound trips, these Lines may not *discharge* passengers at any stop within the District except at the Jefferson Memorial. But they may *receive* passengers at the respective terminals, and at the other stops enroute, for discharge at the Jefferson Memorial. Hence, although there are cer-

tain stops at which these Lines are not authorized to receive or discharge intrastate passengers, they do perform some intrastate service throughout the entire length of their District of Columbia routes over the Highway Bridge.

It is submitted that limitations upon the number or location of stops, or restrictions against receiving or discharging passengers at certain stops, do not operate to take a carrier out of the exemption of Section 203(b) (8), where the carrier is performing some intrastate service throughout the entire length of its route. The proviso reads, "... provided that the motor carrier ... is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each state having jurisdiction ..." There is here no requirement that the carrier stop at each and every intersection, or that it receive and discharge intrastate passengers at each and every stop it is authorized to make. So to construe the proviso is to read into it words which are not there. It is to read the proviso as if it said: "... is also lawfully engaged in *unlimited* (or *unrestricted*) intrastate transportation of passengers over the entire length of such interstate route or routes ..." This Court has many times said that it is not the Court's function "to engrain on a statute additions which we think the legislators logically might or should have made." *United States v. Cooper Corporation*, 312 U. S. 600, 605, and cases there cited.

Moreover, it must be clearly apparent that any such construction of the proviso would be wholly illogical and lead to absurd results. If it is necessary to have authority to stop at every intersection along the route in order to be engaging in intrastate commerce at that point, then, under the same reasoning, it would also be necessary to have authority to stop between intersections and at any place whatever along the route. The reasons which prompt the local authorities to forbid stops in the middle of the block are the same reasons which prompt those authorities to

limit the number of intersections where stops may be made.

Likewise, if it is necessary to have authority to receive and discharge passengers at each and every intersection along the route, in order to be engaging in *intrastate* commerce, this would also be necessary in order to be engaging in *interstate* commerce along that same route. Yet the Commission certainly regards these carriers as being engaged in *interstate* commerce over that portion of their routes lying within the District of Columbia. The interstate motor carrier certificates issued by the Commission contain innumerable restrictions as to stopping places, and innumerable limitations on the carriers' authority to receive or discharge passengers at certain points. But no one has yet contended, least of all the Commission, that a carrier of interstate passengers is not engaging in interstate commerce over those segments of its route where there are limitations or restrictions of this kind.

It is a matter of common knowledge, of which this Court will take judicial notice, that bus lines entering municipalities from outside the city limits are seldom, if ever, permitted by local authorities to stop at each and every intersection in their progress towards the city center.⁷ Hence, under the Commission construction of the proviso to Section 203(b) (8), there would seldom, if ever, be a bus operation to which the exemption could apply. It seems obvious that such an interpretation serves only to defeat the plain purpose of Congress.

As a matter of fact, Congress had in mind the identical Highway Bridge bus operation here in question, when it enacted Section 203(b) (8). Senator Wheeler, in charge of S. 1629—74th Cong., which became the Motor Carrier Act of 1935, (and Part II of the Act), said on the floor of the Senate on April 15, 1935:

⁷ The Commission itself has recognized that local authorities customarily limit the number of bus stops that may be made for the pickup and discharge of passengers. *Lincoln Tunnel Application*, 12 M. C. C. 184, 198; *New Jersey-New York Bus Application*, 28 M. C. C. 107, 111.

"...an exemption is made, unless the Interstate Commerce Commission finds that the law cannot be made to work without its inclusion to some extent, of the transportation of property locally or between contiguous municipalities or commercial zones; as between New York City and New Jersey, and also, for instance, as between Washington and Alexandria, and other contiguous cities where the transportation is regulated by the local governments themselves.

"Transportation of passengers in similar localities or zones, provided the several States having jurisdiction regulate the operation, is also exempted and also casual or occasional or reciprocal transportation . . ." (Cong. Rec. Vol. 79, Part 5, Page 5650).

It is reasonable to assume that Senator Wheeler, when he made that statement, knew that buses operating between Alexandria and the District of Columbia were not authorized to stop at each and every intersection along the route within the District. And yet he supposed that Section 203(b) (8) would exempt that operation, and so advised the Senate.

The Commission interpretation of the proviso in question does violence to the intention of Congress. The Motor Carrier Act of 1935 exhibits, from beginning to end, the determined purpose of Congress to avoid conflicts and duplication between state and federal regulation.* Probably no other act of Congress, before or since, has gone to such

* See: Section 202 (b), reserving to the states exclusive exercise of the power of regulation of intrastate commerce; Section 203 (a) (14) defining the term "common carrier by motor vehicle" as a vehicle engaged in "interstate or foreign commerce"; Section 203 (b) (8), involved in the instant case; Section 204 (a) (4a), providing machinery for the exemption of carriers operating solely within one state; Section 205 (a) providing for joint board procedure; Section 205 (f), providing for conferences, joint hearings and cooperation between Federal and State Commissioners; Section 206 (a), containing a proviso exempting carriers operating solely within a single state from the necessity of obtaining a Federal certificate of convenience and necessity; and Section 216 (e) prohibiting the Commission from regulating intrastate rates or service.

lengths in an effort to preserve state jurisdiction over commerce having a local character. In its favorable report on S. 1629—74th Congress, the House Committee on Interstate and Foreign Commerce said:

“ . . . It seems the more information is obtained, the more apparent is the need for motor-carrier regulation in the public interest to preserve and develop a healthy, adequate, coordinated system of transportation. We can only have such a system by regulation of all agencies of public transportation in such a manner that there will be the least conflict between the State regulations and interstate regulation of motor carriers.” (Report No. 1645—74th Cong., July 24, 1935—page 3.)

Pursuing that purpose Congress included the commercial zone exemption contained in Section 203(b) (8). But Congress did not want to exempt local interstate bus operations from Commission regulation in any case where to do so would leave such operations entirely unregulated. This would have worked an injustice against already existing local operators, for it would have opened the door for others to enter the local interstate field without securing a certificate from any agency of government. Chaotic conditions would have resulted. Senator Wheeler, in his statement to the Senate, explained the situation, and the reasoning behind the proviso to Section 203(b) (8) in these words:

“The purpose of this exemption is to avoid duplication of regulation over bus operations, such as those conducted by street railways. However, the commission is authorized to take jurisdiction, where necessary, over buses operated within a municipality or between contiguous municipalities by motor carriers in interstate service and not so regulated by the States. The absence of such regulation has in some instances created chaotic conditions beyond the control of any State or municipal body . . .” (Cong. Rec. Vol. 79, Part 5, Page 5651).

It is clear, therefore, that there is not the slightest need of giving the proviso to Section 203 (b) (8) the broad application contended for by the Commission in order to accomplish fully the Congressional intent. The Alexandria and Arlington Lines perform some intrastate service throughout the entire length of their respective routes over the Highway Bridge. They are subject to regulation by the Public Utility Commission as to that intrastate service. Such regulation is not impaired in the slightest because of the fact that there are certain intersections where these buses may not receive or discharge passengers. In fact, the imposition of such restrictions is itself an exercise of regulatory jurisdiction by the Public Utility Commission. No "chaotic conditions" can result from these restrictions for they do not result from a lack of local regulatory power, but from an exercise of that power.

These lines are not free to engage in any intrastate operation within the District of Columbia except that expressly authorized by the local commission. Hence there can be no danger of injustice or undue competition with other bus lines also serving that area. The purposes and objectives of Congress in attaching the proviso to Section 203(b) (8) having thus been fully met, there is no occasion or warrant for excluding the Highway Bridge operations of these lines from the exemption provided by that section.

- (2) *The Commission ruling that the Section 203 (b) (8) exemption does not apply because buses of the Arlington and Alexandria Lines, operating over the Memorial Bridge, are not permitted to perform intrastate service in the District of Columbia.*

Neither the Arlington nor Alexandria Line buses which operate over the Memorial Bridge are permitted to perform intrastate service within the District of Columbia. But an examination of the facts reveals that the bus operation over the Memorial Bridge is, in reality, an alternate loop of limited extent on the interstate route between Vir-

ginia and the District of Columbia, and not a "regular or irregular route or routes in interstate commerce," as that term is used in Section 203 (b) (8).

The operation of buses by the Arlington and Alexandria Lines over the Memorial Bridge is of comparatively recent origin.⁹ Neither line was authorized to operate over the Memorial Bridge until February, 1943, when the Public Utilities Commission issued its order Nos. 2507 and 2508. (Ex. 108 and 107, R. 781, 1053, 1049.)

These orders specify the streets to be traversed in using the Memorial Bridge, and establish stop zones. The same District of Columbia terminals are stipulated as in the case of service over the Highway Bridge. To a substantial extent the street designations and stops are identical with those specified for service over the Highway Bridge. They differ only to the extent necessary to permit buses to operate over the Memorial Bridge instead of the Highway Bridge.¹⁰ The north end of these two bridges are nine city blocks apart. Buses traveling over the Memorial Bridge traverse from 12 to 14 city blocks within the City of Washington, before connecting up with the Highway Bridge route. On inbound trips the Memorial Bridge line connects with the Highway Bridge line before the latter line reaches its terminal. On outbound trips the Memorial Bridge line follows along the same streets as the Highway Bridge line for several blocks, before separating to go over the Memorial Bridge.

It is thus apparent that the interstate operation of buses over the Memorial Bridge serves substantially the same persons, and substantially the same areas, as the operations over the Highway Bridge. By sending some of the

⁹ The Arlington Line began operating over the Highway Bridge in 1932. *Arlington & Fairfax Motor Transportation Co.—Purchase*, 25 M. C. C. 461, 465.

¹⁰ During rush hours the Alexandria Line has authority, under Order No. 2507 (Ex. 108, R. 781, 1049), to turn back its inbound Memorial Bridge buses, before reaching its terminal, and send them back to Virginia over the Highway Bridge.

buses over the Memorial Bridge, congestion on the heavily traveled Highway Bridge is lightened. But the same terminals and substantially the same stopping zones are used in each case.

Viewed realistically, then, the operation over the Highway Bridge is the interstate route between Virginia and the District of Columbia, for each of these lines. The Memorial Bridge operation is a departure from that route so minor in character as not properly to be regarded as a separate route within the meaning of Section 203(b) (8). It is not reasonable to suppose that Congress had in mind such slight variances from the normal and usual interstate route, when it used the term "regular or irregular interstate route or routes."

The Arlington and Alexandria Lines were required to obtain authority from the Public Utility Commission before initiating the interstate loop operation over the Memorial Bridge. Hence there was not, and is not, any danger that this operation may invade the interstate or intrastate rights of other operators, and no "chaotic conditions" to use the words of Senator Wheeler, referred to above, can result from exempting such operations from Commission jurisdiction.

Likewise, there would be no validity to the contention that the Memorial Bridge operation, if not constituting a "regular" interstate route, may at least be regarded as an "irregular" route within the meaning of the proviso. The term "irregular" route refers to an "anywhere-for-hire" operation which does not utilize two fixed termini. *United States v. Maher*, 307 U. S. 148, 155.

It is possible to argue that, in ordinary usage, the term "route" means a way used for going from one place to another,¹¹ and so any variation or loop in the streets and

¹¹ See *Atty. Gen. v. West Wisconsin R. Co.*, 36 Wis. 466, 494; 54 Corpus Juris, 1106. The Public Utility Commission orders authorizing service over the Memorial Bridge characterize those operations as "routes."

avenues traversed in going from one place to another constitutes a separate "route." But this reasoning overlooks the fact that we are not concerned with the meaning of the word "route" standing alone and unaffected by surrounding words and phrases or the intention of the draftsman. We are here concerned with the construction of the term "regular or irregular interstate route or routes" as used in Section 203(b) (8). The latter term must be construed in harmony with its context in the Act and with a view to effectuating the Congressional intent. So construed, it is clear that minor variations in the line of operation, having no effect upon the power of the local authorities to regulate and constituting no threat to the stability of other carriers, are not to be regarded as "regular or irregular route or routes," within the meaning of that Section.

The strained construction which the Commission contends for is entirely out of harmony with the Commission's own practice in issuing certificates for interstate service. Section 208(a) requires that "Any certificate . . . shall specify . . . the routes over which . . . the motor carrier is authorized to operate . . ." Under this provision the Commission has ordinarily described routes between cities in terms of particular highways. *Consolidated Freight Lines, Inc., Com. Car. Application*, 11 M. C. C. 131, 133. But when it comes to defining interstate routes *within municipalities*, the Commission has often been content simply to name the city and leave it to the local authorities to specify particular streets and avenues to be used.¹² The Commission followed that practice in the instant case when it authorized the Capital Transit Company to perform interstate service

¹² The Commission usually does not name particular streets and highways within city limits except where the exact routing within the municipality constitutes the very essence of the operation. *White Horse Pike Bus Company, Inc. Com. Car. Application*, 2 M. C. C. 79; *Nevin Midland Lines Com. Car. Application*, 4 M. C. C. 547. See, also, *Lincoln Tunnel Application*, 12 M. C. C. 184, 198; *New Jersey-New York Bus Application*, 28 M. C. C. 107, 111; *Cincinnati, N. & C. Ry. Co. Com. Car. Application*, 30 M. C. C. 423, 440.

between the District of Columbia and the Pentagon Building (R. 1019).

If the certificate specification of the route of an interstate carrier need not include the designation of streets to be traversed within a city, it is difficult to understand why a minor loop in the city operation must be regarded as a separate and distinct route within the meaning of Section 203(b) (8). If the Commission is at liberty thus to interpret the clear language of Section 208(a), requiring the route to be specified in the certificate, this Court is equally at liberty to construe the language of Section 203(b) (8) in a way that will give effect to the legislative intent. In *United States v. Rosenblum Truck Lines*, 315 U. S. 50, at page 55, this Court said:

"... Where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole,' we may follow the purpose of the statute rather than the literal words. *United States v. American Trucking Assoc.*, 310 U. S. 534, 543 . . ."

We are not unmindful of the general proposition that the courts will not give construction to an act of Congress which is expressed in plain and unambiguous terms. But as this court said in *Kirschbaum v. Walling*, 316 U. S. 517, at page 520:

"/"Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn under a federal enactment between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual states . . ."

The purpose of Section 203(b) (8) is to withhold from the Commission jurisdiction over interstate commerce of a purely local character. The purpose of the proviso is to

prevent that exemption from applying in a case where the result will be to leave interstate transportation within a local area entirely unregulated. The application of that proviso should not be extended beyond that absolutely required to achieve that purpose. It is not the proviso, but the section of which the proviso is a part, that expresses the dominant motive of Congress. That motive is to leave local transportation free and clear from federal regulation. The proviso should be construed in such a manner as to give effect, to the fullest extent possible, to that dominant motive. As the Commission itself said in *Palisano Common Carrier Application*, 30 M. C. C. 591, involving the construction of another exemption section, Section 202(c) (2):

"... Reverting to the conditions which surrounded the enactment of this amendment, it is appropriate to point out that Congress had already manifested an intent to relieve us of jurisdiction over local carriers to some extent. That purpose was manifested by the inclusion of section 203(b), (8) in the original act. The present amendment suffices to expand the scope of the exemption as it stood previously so as to apply to cases of local cartage which were not covered by the existing exemption. It is therefore consistent with the known trend of the legislative intent concerning local cartage to adopt such a construction as would exclude from our jurisdiction all local cartage to which its language can reasonably be applied. *It would be foreign to that trend and clearly hostile to the general purpose of the legislation to adopt a construction which imposes a restriction based upon the purely technical and accidental feature of the form of the arrangement between the two carriers.* We are convinced that Congress had no such intention ... (page 594)" (Emphasis supplied).

This Court has several times announced the same rule of statutory construction:

"... in ascertaining the scope of congressional legislation a due regard for a proper adjustment to the local and national interests in our federal scheme must

always be in the background . . ." *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351.

See also:

Kirschbaum v. Walling, 316 U. S. 517, 520;
Palmer v. Massachusetts, 308 U. S. 79, 84.

- (b) THE COMMISSION'S FINDING THAT APPLICATION OF THE ACT TO THE TRANSPORTATION IN QUESTION IS NECESSARY TO CARRY OUT THE NATIONAL TRANSPORTATION POLICY IS WITHOUT EFFECT BECAUSE NOT BASED UPON ANY ADEQUATE FINDING OF FACTS.

The so-called commercial zone exemption of Section 203(b) (8), is not an absolute exemption, but a conditional one. It may be removed by the Commission under certain circumstances. The power of the Commission to remove the commercial zone exemption is set forth in Section 203(b) (7a) as follows:

" . . . nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part apply to: (8) . . . (transportation within commercial zones)."

At the time of issuing its original order of January 18, 1944, the Commission was plainly uncertain of its ruling that the Arlington and Alexandria Lines were not within the Section 203(b) (8) exemption because of their limited intrastate operations within the District of Columbia.¹³ For the purpose of making doubly sure, therefore, the Commission sought to exercise its power, under Section 203(b)

¹³ The Commission order states that "As to the Transit Company and the Coach Company, there is no doubt that we have jurisdiction . . ." (R. 843.) No such unequivocal statement was made respecting the Arlington and Alexandria Lines. Instead, the Commission said, "In view of the fact that the Arlington and Alexandria Lines perform only restricted intrastate transportation in the District, it is reasonably clear that their fares . . . are subject to our jurisdiction." (Emphasis supplied).

(7a), quoted above, to remove these lines from the exemption. The original Commission order recites:

"... In any event, we are of the opinion and find that application of the act to that transportation is, in the language of section 203(b) (7a), necessary to carry out the national transportation policy . . ." (R. 843).

The court below held that the Commission's conclusion respecting the national transportation policy was not supported by findings of fact, and was consequently without legal effect (R. 919). The Commission apparently recognized the inadequacy of the factual basis of its order and, instead of venturing an appeal from the judgment which had been entered, sought to improve its position by reopening the proceeding for a further hearing and further findings.

The reopening availed nothing. The court below reviewed the new evidence and additional findings and reached the conclusion that (1) the Commission has not made adequate findings to support the conclusion that the exercise of its jurisdiction is necessary to carry out the national transportation policy, and (2) the record does not contain substantial evidence upon which the Commission could make proper and adequate findings to support such a conclusion.

The first of these points is discussed below, under two subheads. We also rely upon the second point, relating to the *lack of substantial evidence*, but this matter is fully covered in the brief of the carriers and is therefore not argued in this brief.¹⁴

¹⁴ The absence of substantial evidence to support the finding that application of the Act was necessary in order adequately "to meet the needs . . . of the national defense" was clearly pointed out by the Court below, in these words:

"As to the new evidence and findings of fact upon which the Commission undertakes to conclude that it has jurisdiction because it 'is necessary to carry out the national transportation policy' the Commission bases its conclusion chiefly on the find-

(1) The national transportation policy is inapplicable because the transportation in question is local in nature, and not a part of the national transportation system.

To support its conclusion that application of the Act to these carriers is necessary in order to carry out the national transportation policy, the Commission makes two general findings; first, that the present fares are unreasonably high; and second, that because of these unreasonable rates, the transportation in question is not adequate to meet the needs of the national defense (R. 819, 825). That these findings do not adequately support the Commission's conclusion that application of the Act to these carriers is necessary in order to carry out the national transportation policy, is demonstrable from an analysis of the declaration of policy itself.¹⁵

ing that the employees of the Pentagon are dissatisfied with the fares charged by the carriers and the importance of the war work carried on at the Pentagon. As to the first ground, apart from the fact that the dissatisfaction of the employees with the fares charged by the carriers is ground for finding that their reduction is necessary to carry out the national transportation policy, *there is a mere scintilla of evidence* to support this finding. The Commission's findings were that many of the passengers to the Pentagon are low-salaried employees of the Government and that a representative group of them were dissatisfied with the fares. As to the latter finding, it clearly appears that the proportion of turnover of employees at the Pentagon did not exceed the average in government departments, and in only a very few instances did employees give the rate of fares as the cause of their dissatisfaction." (Emphasis supplied) (R. 944.)

¹⁵ The national transportation policy, 49 U. S. C., preceding sections 1, 301, and 901 reads as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable

It will be observed that the national transportation policy first sets forth a number of specific benefits to be achieved, among them, "the establishment and maintenance of reasonable charges for transportation services . . ." The declaration of policy next sets forth the general field in which the Commission is to seek achievement of these specific benefits, the following words being used: "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means . . ." Lastly, the declaration specifies the kind of national transportation to be attained, namely, a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

The findings of the Commission cover the first and last of these three mutually dependent parts of the declaration of policy.¹⁶ But they do not cover the second part, which is the core of the declaration. Stated differently, the Com-

charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

¹⁶ For the purpose of this brief it is assumed that the findings of fact are adequate as to these two matters. However, it should be noted that the Court below thought that the findings were inadequate on the national defense item. Said the Court: "As to the importance of the Pentagon in the prosecution of the war, Congress has not provided that the Commission could take jurisdiction merely because of the importance of transportation to or from a government agency. There must be more than this; it must appear that the war work of the government is materially affected and not merely that a small portion of the workers are dissatisfied with the rates of fare charged by the carriers." (R. 944.)

mission finds that the reasonableness of rates is involved in this case, and that the adequacy of transportation service to meet the needs of the national defense, is involved. *But there are no findings that application of the Act to these carriers is necessary for the purpose "of developing, coordinating, and preserving a national transportation system . . ."* (Emphasis supplied).

A local or urban transportation company, as such, is not a part of the interstate transportation facility of the nation, and it can never be a part of a national transportation system unless it is in some way integrated with other transportation units in such a manner as to become a part of the national network of interconnected transportation facilities.¹⁷

The Commission made no finding that the *national transportation system* was in any way involved. As a matter of fact the Commission found expressly to the contrary—it found that the transportation was local, urban mass transportation. In its original order the Commission said:

"This is urban, mass transportation between points in the District and points in Virginia just beyond the District-Virginia line, and is the same in all essential characteristics as the transportation between residential areas of the District and commercial and Government establishments in the District." (R. 849.)

In the supplemental order the Commission said:

"We have held that the transportation here under consideration is essentially urban in character." (R. 823.)

¹⁷ "*System.* An aggregation or assemblage of objects united by some form of regular interactions or interdependence; a group of diverse units so combined by nature or art as to form an integral whole, and to function, operate, or move in unison and, often, in obedience to some form of control; an organic or organized whole, as, to view the universe as a *system*; the solar *system*; a new telegraph *system*." (Webster's New International Dictionary, 2nd Ed., Unabridged.)

There is no finding or contention by the Commission that these local, urban carriers have any connection with or effect upon any other carrier either within or beyond the Washington, D. C., commercial zone. There is no finding or contention by the Commission that the operation of these carriers has any effect whatever upon the national transportation system. The reason why the Commission makes no finding or contention of this character is clear. Local carriers engaged in mass, urban transportation, operating independently of and without relation to other carriers which serve beyond the local area, are merely individual entities, the operations of which do not affect the national transportation system as a whole.¹⁸

Long before the national transportation policy became a part of the Act, the Commission had drawn a clear distinction between individual carriers and the "national transportation system." In the *Fifteen Per Cent Case*, 1931, Ex Parte No. 103, 178 I. C. C. 539, 585, the Commission said:

"... All this is contrary to the spirit of the transportation Act, 1920. Congress then looked beyond the individual railroads to the concept of a national transportation system . . ."

This view was still more forcefully presented in a dissenting opinion by Commissioner Eastman when the *Fifteen Per Cent Case* came on for further hearing. Commissioner Eastman there said:

"In that act (Transportation Act, 1920), Congress for the first time dealt with the railroads, not alone as individual entities, but also as parts of a national transportation system to be adequately maintained in the interest of the whole country. It saw that these parts

¹⁸ This is not to say that, in effectuating the national transportation policy the Commission should not "give consideration to the circumstances of individual transportation units and to the needs of their patrons." (R. 819.) But those circumstances must show, and the Commission must find, that the individual transportation units are related to and effect the general transportation system throughout the nation.

were interrelated, that they were mutually dependent upon each other, and that the transportation service which the country required could not be adequately maintained unless *the whole of which they were parts, i.e. the national transportation system was recognized and protected as such.*" (179 I. C. C. 215, 230.)

Heretofore the Commission has removed carriers from the exemption of Section 203(b) (8), only where it was shown that their operations were of an interterminal character, as distinguished from an intraterminal or urban character. The reason for this was patently because operations of an interterminal character are a part of, or effect, the national transportation system. The first of these cases was *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone*, 1 M. C. C. 656, 663, where the Commission said:

"The exemption provided in section 203(b) (8) applies to transportation between contiguous municipalities 'unless and to the extent' we find that the application of all provisions of the act is necessary to carry out the policy of Congress enunciated in section 202(a). We believe that that policy requires that the regulatory provisions of the act should, in general, be applied to interterminal transportation and that where, as in the case of East St. Louis and Belleville, two cities are contiguous in the sense that their boundaries join at some place but are not part of a single terminal, there should be no exemption."

The Commission took like action in *New York, N. Y. Commercial Zone*, 1 M. C. C. 665, 671, citing with approval the St. Louis decision, and adding:

"... By restricting the commercial zones to areas which are adjacent to municipalities and contiguous municipalities, it is presumed that Congress intended to restrict such zones to those areas in which transportation by motor vehicle is in the nature of an intra-terminal movement..."

A supplemental report was thereafter issued in the *New York* case, in which the Commission said:

"... we were persuaded that the purpose of the exemption in section 203(b) (8) was to remove from Federal regulation operations which, although in interstate or foreign commerce, were nevertheless of a distinctively local or urban type, which we termed 'intraterminal' as distinguished from intercity or intercommunity operations . . ." (2 M. C. C. 191, 192).

In *Los Angeles, Calif., Commercial Zone*, 3 M. C. C. 248, the Commission had before it a request by motor carriers that operations between Los Angeles and port facilities at San Pedro and other points, which were exempt under Section 203(b) (8), be removed from that exemption "in order to prevent unfair and destructive competitive practices between the motor carriers which operate to and from the port, and to carry out in other respects the policy of Congress declared in section 202." In granting this request the Commission said (page 252):

"Because of the distance between the port and the main business and industrial sections of Los Angeles, and because of the nature of the transportation, the movement of property to and from the port is not local but intercity in character, and it should be regulated under all provisions of the act. We find that the removal of the exemption provided in section 203(b) (8) is necessary to carry out the policy of Congress enunciated in section 202 . . ."

The two *New York* cases referred to above were sustained by a three judge statutory court in *Charles Noeding Trucking Co. v. United States*, 29 F. Supp. 537. Among the many issues involved in that review was the question of whether the Commission made adequate findings to support that portion of its order which removed certain areas from the New York commercial zone exemption. In upholding the Commission order, the Court held that the findings were adequate because they were to the effect that inter-

state or foreign commerce would be damaged unless this was done. In other words, the Court held that the findings supported the view that removal of the exemption was necessary in order to develop, coordinate, and preserve a "national transportation system." The Court said, on page 551:

"While Congress created areas or zones of partial exemption by the provisions of Section 203(b) (8), it is obvious that Congress did not intend them to be continued in existence if transportation by motor vehicle through and to them, though between contiguous or adjacent municipalities or zones, *was not in the nature of intraterminal or urban cartage between localities commercially integrated and would work damage to interstate or foreign commerce.* The power to remove the partial exemption was vested by Congress in the Commission as a remedy for such damage. The Commission therefore makes a distinction, and we think that it is a logical one, between purely local or urban cartage, which it designates as 'intraterminal' in character and cartage of a kind not urban or local and not between municipalities or zones commercially a part of one another, viz., 'interterminal' transportation. We think that this construction of the statute is correct and is one justified by the established rules of statutory construction. Moreover, the Commission goes further and specifically applies its ruling to particular municipalities." (Emphasis supplied.)

The Commission made no finding in the instant case that the operations in question were interterminal in character. It found exactly to the contrary. The Commission made no finding that the development, coordination and preservation of an adequate "national transportation system" will be prejudiced if this Act does not apply. Without such a finding, the general conclusion that application of the Act is necessary in order to carry out the national transportation policy is without adequate support and therefore without effect.

The necessity for adequate findings as to jurisdictional facts has been well stated by this Court in the recent case of *City of Yankers v. United States*, 320 U. S. 685, where it said:

"... The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains. Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears ... (page 691)

"... Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone." (page 692)

To the same effect, see *Florida v. United States*, 282 U. S. 194. In the conclusions and findings in the instant case the Commission said (R. 849):

"This is urban, mass transportation between points in the District and points in Virginia just beyond the District-Virginia Line and is the same in all essential characteristics as the transportation between residential areas of the District and commercial Government establishments in the District. ... These installations represent to all intents and purposes an extension of the main business area of Washington."

Applying the standard which the Commission itself laid down in the *Charles Noeding Trucking Company* case to the facts of the instant case, as recited in the above quoted excerpt from the Commission's report, it becomes obvious that the national transportation policy has no possible connection with the bus operations here in question and that they are exempt, under Section 203(b) (8), from federal rate regulation.

- (2) *There is no valid finding that the objectives of the national transportation policy can be attained only by federal regulation.*

But assuming that the Commission has made findings which establish that the purposes and aims of the national transportation policy are involved in this case, it still remains for the Commission to establish that *application of the Act* is necessary in order to effectuate that policy.

Section 203(b) (7a) does not authorize the Commission to remove carriers from the exemption of 203(b) (8) upon consideration of the reasonableness of the local rates, or because the national defense is involved. *It must also appear that those conditions can be cured only by the assumption of federal regulation.* The Section 203(b) (8) exemption applies "unless and to the extent that the Commission shall from time to time find that such application (of the Act) is necessary to carry out the national transportation policy declared in this Act . . ." (Section 203(b) (7a), emphasis supplied).

It is clear that the Commission's original report and order contained no finding of necessity—no finding that the national transportation policy can be achieved *only* by applying the Act to these carriers. The trial court put its finger squarely on this defect in the Commission's original order when it said: ". . . nor does it (the Commission) make any findings to support its general conclusion that its order 'is necessary' to carry out the national transportation policy . . ." (R. 917).

In the reopened proceedings, as during the original hearings, there was a complete lack of evidence as to whether, assuming the objectives of the national transportation policy to be involved, *application of the Act* was necessary to achieve those objectives. No testimony was offered and no findings were made showing that relief had been sought through the local regulatory agencies, the Public Utilities Commission and the Virginia Commission.

The only statement bearing upon this phase of the case was not a finding of fact at all, but a legal conclusion as follows:

"No agency other than this Commission is empowered to regulate the fares in issue. It is a well-established rule that even where the Federal Government does not occupy the field, the States are without power to regulate charges for interstate transportation. Minnesota Rate Cases, 230 U. S. 352, 399-401, and cases cited there." (R. 819.)

The rule set forth in the Commission's report is applicable where the interstate transportation, sought to be regulated by a state, extends throughout the state or an important part thereof, and also in cases where the transportation is part of a connected system or network extending into large areas in other states. But this rule has no application to a case such as this where the transportation, although crossing a state line, is purely urban or local in character.

The applicable rule, where the transportation is local in nature, was announced by this Court in *Port Richmond Ferry Co. v. Board of Chosen Freeholders*, 234 U. S. 317. In that case, rates of fare for ferriage from New Jersey to New York, fixed by the Board under authority of a New Jersey statute, were sustained. The Court there said:

"These (ferries) have always been regarded as instruments of local convenience, which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power.... It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates....

It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a ferry, which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions. . . . The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control." (234 U. S. 331-332)

The *Port Richmond* decision is in complete accord with principles governing State jurisdiction over interstate commerce, as first announced in 1851, in the *Pilotage Cases*—*Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 298, 319, and ever since adhered to by this Court. Those principles, as stated by the Court in the *Minnesota Rate Cases*—*Simpson v. Shepard*, 230 U. S. 352, 399, are as follows:

"The grant in the Constitution . . . established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

The regulation of ferry rates between New Jersey and New York was held not to be a matter requiring "a general system or uniformity of regulation," but rather a matter admitting of "diversity of treatment according to the special requirements of local conditions." Accordingly, there being no act of Congress providing such regulation, the Court in the *Port Richmond Ferry Company case* held that local authorities were free to regulate the fares for this interstate transportation.

The same principle was applied by this Court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, where it was held that the New York Commission had the power to regulate rates at which natural gas, transmitted directly from the source of supply in Pennsylvania, is sold, by the same company, to consumers in the cities and towns of New York.¹⁹ See, also, *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 238; and *Corporation Comm'n v. Cannon Mfg. Co.*, (No. Car.) 116 S. E. 178.

Likewise, in *Public Utilities Com. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, the Court, in holding that States may not regulate interstate wholesale rates for electric energy, implied that State regulation of local consumer rates would be valid, even though the electric energy was transmitted from a point beyond the State line.²⁰

¹⁹ This case was later disapproved to the extent that it conflicted with the declaration in *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 472, wherein it was held that the sales of gas to consumers in that case constituted intrastate commerce, subject to state taxation. However, the principle announced in the *Pennsylvania Gas Co. case*, to the effect that service supplied across a state line does not preclude state regulation, was not designed to be disapproved. This is shown by the later citation of the *Pennsylvania Gas Co.* case in *Illinois Gas Co. v. Public Service Commission*, 314 U. S. 498, 505; in the dissenting opinion of Mr. Justice Roberts in *Jersey Central Co. v. Federal Power Commission*, 319 U. S. 61, 80; in the opinion of Mr. Justice Jackson in *Federal Power Comm'n v. Hope Gas Co.*, 320 U. S. 591, 651, and in *Safe Harbor Water Power Corp. v. Federal Power Commission*, 124 F. 2d 800, 807.

²⁰ See, also, *Safe Harbor Water Power Corp. v. Federal Power Commission, supra*.

Similarly, this Court held, in *Eichholz v. Public Service Commission*, 306 U. S. 268, that the Missouri Commission had power to revoke a state permit to operate a motor carrier in Missouri on an interstate route going from St. Louis to Kansas City, Missouri, via Kansas City, Kansas. The Court there said (page 274):

"...We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected . . .".

In *Southwestern Bell Telephone Co. v. United States*, 43 F. Supp., 403, the court, in construing Section 221 (b) of the Federal Communications Act, assumed, but did not expressly hold, that telephone exchange service between Kansas City, Missouri, and Kansas City, Kansas, was subject to regulation by the respective commissions of Missouri and Kansas.

It thus appears that transportation, when of a local character; as by ferry boats, sales of electric energy or natural gas across state lines, local interstate motor truck operations and interstate exchange telephone service, has been held, either expressly or by implication, subject to local regulation.²¹

Acting upon the same principle, and in reliance upon these court decisions, Congress has several times expressly exempted certain types of interstate commerce of a local

²¹ In recent years the Supreme Court has been giving increasing latitude to the States to regulate commerce and industry, where no express provision in federal statutes, or commission regulations thereunder, is found to the contrary, even though interstate commerce is thereby affected and burdened. See, *California v. Thompson*, 313 U. S. 109; *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U. S. 1; *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U. S. 261; and *Parker v. Brown*, 317 U. S. 341.

nature, from federal regulation. In doing so, Congress has not sought to create a hiatus in regulation by exempting from federal regulation a type of commerce which the States were constitutionally inhibited from regulating. Rather, Congress has established these exemptions in the clear expectation that the exempted commerce would and should be subject to state regulation. The Constitutional power of Congress to do this, and of the states to exercise the control thus made available to them was sustained in *James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311.

The most pertinent example of this is the Section 203 (b) (8) exemption in question in the instant case. Congress did not expect that the exemption of interstate motor carrier operations within municipalities or commercial zones would mean that they would escape regulation completely. The wording of Section 203 (b) (8) itself indicates that Congress intended the local authorities to supply this regulation. The debates in Congress, referred to at an earlier point in this brief, are indicative of this same understanding. To say that the states are without constitutional power to regulate this local interstate service, is to assert that Congress misconceived the decisions of this Court touching on important constitutional questions, or that Congress deliberately set out to create a void in the regulatory field.

Congress has made similar exemptions in other regulatory acts. In the Communications Act of 1934, wire communication between two points in the same state, although passing through a place outside thereof, is exempted from federal regulation "if such communication is regulated by a State Commission."²² The same Act excepts telephone exchange service from federal regulation, even where such service extends across a state line "in any case where such matters are subject to regulation by a State commission or

²² Section 3 (e), 47 U. S. C. 153 (e).

by local governmental authority."²³ It will be observed that these exceptions expressly contemplate state commission regulation, and in fact the exception is made to apply only where there is state commission regulation.

Similarly, in the Federal Power Act, enacted in 1935, Congress provided that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof . . ."²⁴ If the energy is returned to the state and consumed therein, it is not subject to federal regulation; *Re Chicago Dist. Elec. Generating Corp.*, 39 P. U. R. (N. S.) 263. The same Act excluded retail sales from Federal regulation, even though the electric energy may be imported from outside the state.²⁵ The Natural Gas Act, enacted in 1938, similarly limits federal regulation to sales at wholesale.²⁶

The purpose of Congress in thus limiting the jurisdiction of the federal agency, in each of these cases, was, quite plainly, to leave the field of local service by these utilities, completely unoccupied by federal authority, so that the states might continue to regulate, even where interstate commerce might be involved. As explicitly stated in the report of the Committee of each House of Congress on the Natural Gas Act:

"The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of

²³ Section 221 (b), 47 U. S. C. 221 (b).

²⁴ Section 201 (e), 16 U. S. C. 824 (e).

²⁵ Section 201 (d), 16 U. S. C. 824 (d).

²⁶ Section 1 (b), 15 U. S. C. 717 (b).

such jurisdiction." (House Report No. 709—75th Cong., 1st Session, Page 1, Senate Report No. 1162—75th Cong., 1st Session, Page 1).

In asserting that local authorities are without power to regulate the interstate rates for transportation within the Washington, D. C. Commercial Zone, the Commission relies upon a statement made by Mr. Justice Hughes in the *Minnesota Rate Cases, supra*. He there said:

"They (the states) have no power . . . to prescribe the rates to be charged for transportation from one state to another . . ." (page 401).

That case, however, did not involve interstate commerce of a local character, such as that involved in the instant case. Nor did the cases cited by Mr. Justice Hughes, save one, involve transportation of a local character. Rather, they involved general transportation throughout the State or a large segment of the State, or transportation connected and interrelated with an extensive network or system of interstate transportation.

The sole exception is the *Covington Bridge Co. case*,²⁷ where the majority opinion held invalid a Kentucky statute reducing bridge tolls across the Ohio River into Ohio. In that case four justices, in a concurring opinion, based their concurrence upon the proposition that the bridge was built under a franchise given by concurrent acts of the two states, which authorized the Covington Bridge Company to fix tolls, and that this franchise could not be altered by one state without the consent of the other. But these four justices asserted that rates for transportation of a local character might be regulated by state laws, saying:

"The several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of Congress over interstate commerce." (154 U. S. 223).

²⁷ *Covington & Co. Bridge Co. v. Kentucky*, 154 U. S. 204.

Mr. Justice Hughes, who wrote the opinion in the *Minnesota Rate Cases* in 1912, also was the writer of the opinion in the *Port Richmond Ferry Co. case, supra*, which was decided in 1914. In the latter decision, the Court held, as we have seen, that ferriage is transportation of a local character, charges for which, although the same may be interstate, may be regulated by the state from which the ferriage begins, in the absence of federal regulation. In the *Port Richmond Ferry Co. case*, the court was confronted with the *Covington Bridge Co.* decision. Without expressly overruling that case, Mr. Justice Hughes so distinguished the same as to make it clear that the Court now approved the *Covington Bridge Co.* decision only by reason of the fact which had been made the basis for the action of the four concurring justices. The Hughes opinion, after acknowledging that the majority opinion in the *Covington Bridge Co. case* had held the state rate regulation violative of the commerce clause, said:

"... It was pointed out, however, that the State of Kentucky, by the statute in question, attempted 'to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky,'—a right which practically nullified 'the corresponding right of Ohio to fix tolls from her own state.' (Id. p. 220) *And this was an adequate basis for the judgment.* Four of the justices of the court, concurring in the judgment, announced their view that 'the several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of Congress over interstate commerce.' " (Emphasis supplied) (234 U. S. 328-329)

The opinion in the *Port Richmond Ferry Co. case*, written by Mr. Justice Hughes, and handed down in 1914, necessarily modified the summary statement heretofore quoted from the *Minnesota Rate Cases* opinion, written by Mr.

Justice Hughes in 1912, to the effect that the states have "no power *** to prescribe the rates to be charged for transportation from one state to another." It established an exception.

The authority for that statement, thus broadly made in the *Minnesota Rate Cases* opinion, was the *Covington Bridge Co. case*, and other cases, the language of which had been accepted as governing without reexamination.

The *Port Richmond Ferry Co. case* having thus overruled these earlier cases, insofar as they declared *all* interstate transportation beyond the reach of state regulation, and having established ferry transportation, at least, as an exception to the general rule stated in those cases, it must necessarily follow that whatever transportation across state lines is so far local in character that national regulation thereof is not required, and is not supplied by the Congress, is in fact subject to state regulation.

It therefore appears that the Commission was clearly in error in holding it to be a "... well established rule that even where the Federal Government does not occupy the field, the States are without power to regulate charges for interstate transportation ..." There is no constitutional rule whereby the local authorities of Virginia and of the District of Columbia are prevented from regulating the bus and street railway fares in question under the principle established in the *Port Richmond Ferry Co. case*. The Commission reports are thus left with neither findings of fact nor sound legal conclusions establishing that attainment of the objectives of the national transportation policy can be achieved only by federal regulation. Without such findings the attempt to remove these carriers from the exemption of Section 203(b) (8) is abortive, for there is a total lack of the essential finding of necessity required by Section 203(b) (7a).

II.

The Commission failed and refused to refer the proceeding to a properly constituted joint board for a hearing and recommended report and order.

Section 205(a) of the Interstate Commerce Act reads in part as follows:

"The Commission *shall*, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States . . . refer to a Joint Board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: . . . complaints as to rates, fares, and charges of motor carriers . . ." (Emphasis supplied)

It is our contention that the instant proceeding is a "complaint" matter within the meaning of the above quoted statute.

It is true that the Commission order instituting the proceeding recites that "*It is ordered*, That an investigation be, and it is hereby instituted, into and concerning the reasonableness and lawfulness otherwise of the fares of respondents . . ." (R. 734). However, the case was initiated when the Secretary of War, with the concurrence of the Secretary of the Navy, on April 27, 1943, wrote to the Interstate Commerce Commission complaining that the fares charged by the Virginia Lines and the Transit Company for transportation service between the District of Columbia and Virginia installations were excessive.

That the Commission regarded the proceedings as in the nature of a complaint matter, even though termed an "investigation" in the original order, is indicated by the letter which Commissioner Patterson wrote to Colonel Barron under date of August 14, 1943, reading in part as follows:

"Since this investigation was instituted at the request of the War Department, which alleged that the

existing fares were excessive, it is '*in the nature of a complaint*' and accordingly it is believed proper that the Department (War Department) should proceed first and introduce evidence that it may have tending to show the unreasonableness of the existing fares, of their unlawfulness otherwise, to be followed by other parties who have evidence of a similar nature, and then by respondents. This order of presentation of the evidence will, I believe, expedite the hearing of this case." (Emphasis supplied) (R. 10)

The presiding Commissioner, in referring to this letter, said:

"It was signed by me. That has been approved by the entire Commission." (R. 10)

The original hearing before the Commission was conducted, from beginning to end, as a complaint case. The War and Navy Departments were required to present their evidence first; the Commission made no investigation of its own and produced no evidence of its own; the Commission did not require the carriers to produce any evidence or make any showing except to the extent requested by the War and Navy Departments. At the rehearing the Commission put into the record a small amount of evidence relating to the certificate rights of the carriers.

The Commission certainly has power to initiate an investigation upon the basis of information contained in a complaint. As indicated above, if that was done here, it was done in name only. But even if done in fact, such action cannot be utilized to circumvent the express and mandatory provisions of Section 205(a). Congress has given the Commission no power to defeat the plain mandate of the statute by converting a complaint case into an investigation case. If the Commission desired to conduct a *bona fide* investigation, it could have done so in conjunction with the complaint proceeding, before the Joint Board. Section 205(a) specifically provides that the Commission may refer any investigation proceedings to a Joint Board. It can-

not avoid the Joint Board method of procedure by the simple device of calling this procedure an investigation, or even by instituting an actual, *bona fide* investigation.

It may be argued that the instant matter is not a "complaint" proceeding for the reason that the letter from the Secretary of War to the Commission which initiated the proceeding did not fulfill the requirement of the Commission's General Rules of Practice relating to the filing of "formal complaints" (Rules 26 to 34). However, the Commission's General Rules of Practice also provide for the filing of *informal* complaints.²⁸

The Commission, on page 69 of its brief in the instant case, cites (footnote 25), *Cicardi Bros. Fruit & Produce Co. v. Atlantic C. L. R. Co.*, 227 I. C. C. 67, 69, as authority for the statement that the letter of the Secretary of War "did not even meet the requirements of an informal complaint such as prescribed in the Commission's General Rules of Practice." But examination of that Commission decision reveals that it is actually authority for the opposite conclusion, since the decision affirms a previous Commission decision which had held an informal complaint to be sufficient to toll the running of the statute of limitations. Moreover, there is more reason for requiring informal com-

²⁸ Rule 24. "*Informal Complaints Not Seeking Damages*.—(a) Form and content.—Informal complaint may be by letter or other writing, and will be serially numbered and filed as of the date of its receipt. No form of informal complaint is suggested, but in substance the letter or other writing (original only need be filed except as provided in rule 25 (d)) must contain the essential elements of a formal complaint as specified in rules 28 and 30. It may embrace supporting papers.

"(b) Correspondence handling.—If the informal complaint appears to be susceptible of informal adjustment, a copy or a statement of the substance thereof will be transmitted by the Commission to each person complained of in an endeavor to have it satisfied by correspondence and thus obviate the filing of a formal complaint.

"(c) Discontinuance without prejudice.—A proceeding thus instituted on the informal docket is without prejudice to complainant's right to file and prosecute a formal complaint, in which event the proceeding on the informal docket will be discontinued."

plaints to be set forth in considerable detail, where the matters involved are a series of freight shipments, at varying rates, over an extended period of time, and when reparations are sought, than in cases like the instant one, where the passenger rates and operations in question do not involve a complex set of facts. See, also, *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217.

Congress made no distinction between *formal* and *informal* complaints. Section 205(a) does not restrict the mandatory reference of rate and fare matters to Joint Boards, to matters initiated by *formal* complaints. To interpret the statute as referring only to *formal* complaints is to read into the statute something which is not there. The Commission, after passage of the Act, adopted rules of practice dividing complaints into "formal" and "informal". It did so for legitimate purposes in connection with administration of the Act. But the Commission is without power, either by promulgation of rules or otherwise, to deny a hearing, or deny the type of hearing expressly provided by statute. Hence, it is without significance that the Commission's rules do not provide for hearings in the case of what it has called "informal" complaints. Where that rule runs counter to an express statutory provision for a particular kind of hearing of all complaint cases, it must necessarily give way.²⁹

The pronouncement of the U. S. Supreme Court in *Palmer v. Massachusetts, supra*, amply supports the view that words and meanings not clearly expressed in statutes of this character should not be read into the statute by implication where the effect is to deprive state regulatory authorities of powers which Congress intended to leave in them.

²⁹ Our contention does not mean that every complaint, no matter how informal or trivial, must go to a Joint Board hearing. The Commission's rules (Rule 24 (b)) appropriately provide for "informal adjustment." It would only be in those cases where such adjustment is not obtained that a reference to a Joint Board would be required, and then only in the comparatively narrow range of cases named in Section 205 (a).

If any liberties are to be taken in construing Section 205(a) they should be taken in the direction of upholding the mandatory features thereof. This is true for the reason that the entire Act displays a Congressional intent to preserve local authority to the fullest possible extent. The national transportation policy itself mandatorily requires the Commission to "cooperate with the several States and the duly authorized officials thereof."

The clear language of the above statute should not be taken lightly. The legislative history of this section plainly indicates that the requirement of reference to a Joint Board was a basic consideration in the mind of Congress. Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, made the following significant statement when the Act was in process of enactment (Cong. Rec., April 15, 1935, Vol. 79, Part 5, Page 5653):

"A basic principle of the bill is that the regulatory bodies of the several States shall share in its administration because of their intimate knowledge of local conditions, their more direct contacts with the carriers subject to regulations, and the relation of such regulation to the use of the State's highways. To that end provision is made for the primary consideration of all important matters by joint boards composed of the representatives of the States wholly or chiefly concerned . . ."

"The bill contemplates submission of such matters to Joint Boards where the motor carrier operation involves not more than three States and the optional use of the Joint-Board procedure where a greater number is involved." (Emphasis supplied)

During the debates in the House, Congressman Crawford indicated how vital were the Joint Board provisions of the Act, when he said:

"If it was not for the decentralizing provisions in this bill, I would not vote for it for that reason. This bill breaks down the Washington control and sets up local control where the interested parties may appear, at small expense and before those who know the local

conditions. This is a great redeeming feature of this bill." (Cong. Rec. July 31, 1935, Vol. 79, Part 11, Page 12224).

It may be argued that the failure to refer this proceeding to a Joint Board, if an error, was merely one of procedure and unimportant because the case was eventually heard and considered by the full Commission. In effect this is to argue that no reversible error would be involved in this court case if the proceeding were heard in the first instance by a United States Commissioner, then by a single District Judge, then by the Circuit Court of Appeals, and finally by the Supreme Court, because in the end it would be passed upon by the highest tribunal which it could have reached had it started in a Three-Judge Court as required by law.

Such an argument runs completely counter to the expressed intent and command of Congress. As noted above, the Joint Board features of the law represent "a basic principle" of the Act. By other provisions in the Act, Congress has been careful to leave no doubt about the mandatory nature of this reference procedure. In Section 17 of the Act, the Commission is "authorized" to organize itself into divisions and to set up boards of employees. It "may" refer matters, "*except matters required to be referred to Joint Boards by Section 305* (Section 205 of the Act)," to a division, a single Commissioner or a board. Thus Congress makes clear that the Commission *may not* refer to a division, a single Commissioner, or a board of employees, matters which Section 205(a) *require* to be referred to a Joint Board. Section 205(h) of the Act provides that "all provisions of Section 17 of Part I shall apply to all proceedings under this Part (Part II)."

The Commission derives all its powers from the statutes. It cannot disobey a positive Congressional demand with impunity. The failure to refer this proceeding to a Joint Board for hearing and recommended report and order is a fatal jurisdictional defect which renders the entire order void.

III.

The Commission order constitutes a regulation of intrastate commerce.

Fares of the Transit Company for its service in the District are 10 cents, three tokens for 25 cents or a weekly pass which is sold for \$1.25 (R. 838). The weekly pass is good for transportation over any and all lines of the Transit Company within the District during the week of issuance. The Commission order requires that this same pass be made applicable to interstate transportation over the Transit Company's lines, to and from the Pentagon from and to any point in the District. On this the Commission's original report provides:

"We further find that the bus fares and the bus-streetcar fares of the Capital Transit Company in issue are unreasonable in those instances where, and to the extent that, they exceed the fares now maintained within the District of Columbia, which latter fares, including all transfer privileges, we find to be reasonable for application to and from the Pentagon building and intermediate points . . ." (R. 850).

The action of the Commission in setting an interstate fare exactly the same as an intrastate fare for a lesser distance over part of the same route has the appearance of being unreasonable and arbitrary.³⁰ But when, as here, the Commission order goes further, and provides that interstate

³⁰ The Commission took this action on the theory that the Virginia installations were really a part of the downtown business district of the District of Columbia, and hence should be within the same fare zone. The Commission order recites:

"We are unable to accept respondents' contention that a proper demarcation line for the application of the District fares is the political boundary between the District and Virginia . . ." (R. 848).

"We do not think that extension of the District fare zone should be denied because of overlapping jurisdiction with the District commission and resultant regulatory difficulties . . ." (R. 850).

passengers must be afforded an opportunity to buy a weekly pass which may also be used for unlimited intrastate transportation, there is involved a direct violation of the statutory prohibition against Commission regulation of intrastate commerce.

The Commission has not contented itself with telling the Transit Company that it must sell a \$1.25 weekly pass, good for interstate transportation between the District and the Pentagon. Had the Commission intended the weekly pass to be good only for transportation to and from the Pentagon, it would not have set the price at \$1.25. Under the Commission order any person can, by purchasing tokens, obtain six round trips between the District and the Pentagon for \$1.00, and seven round trips for \$1.16 $\frac{2}{3}$. Such a person would not buy a \$1.25 weekly pass unless he intended to use that pass for trips wholly within the District as well as for trips to and from his employment at the Pentagon.

What the Commission has really done is to say to the Transit Company: "You must sell interstate passengers a \$1.25 weekly pass which they may also use evenings and week-ends for unlimited intrastate transportation within the District of Columbia." It is clear that this is a direct and specific regulation of intrastate fares. What fares are reasonable and lawful for intrastate transportation within the District is for the Public Utility Commission to decide. This is true whether that transportation is being used by persons whose place of employment is within the District, or by erstwhile interstate passengers who are employed at the Pentagon.

The fact that the Commission order applies only to persons who also buy interstate transportation is immaterial. That a person may be an interstate passenger on Saturday affords no basis for Commission jurisdiction over his intrastate journeys on Saturday night or Sunday. A state commission would have no power to require a carrier to transport, in interstate commerce, at a fixed rate or free, holders

of intrastate weekly passes. Likewise the Commission has no such power respecting intrastate commerce.

The fact that the price set by the Commission for weekly passes is the same as the price authorized by the Public Utilities Commission is also immaterial. Actually the weekly pass prescribed by the Commission is not the same price, but cheaper, in view of the fact that the holder thereof is entitled to more transportation (including interstate transportation) than ordinary pass holders. But, in any event, the coincidence of price parity does not vest the Commission with jurisdiction expressly withheld by statute. If the Commission has jurisdiction to fix any intrastate rate it has jurisdiction to fix an intrastate rate which is lower or higher than existing intrastate rates. And if the Commission has no jurisdiction to fix intrastate rates, it cannot acquire such jurisdiction by adopting the existing intrastate level.

That the Commission is wholly without power to enter an order in any way regulating intrastate rates and fares of motor carriers, is shown by the following explicit provisions of the Act:

"Nothing in this part (Part II) shall be construed to . . . interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." (Section 202(b))

" . . . *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever." (Section 216(e))

The Commission itself has recognized the plain meaning of these statutory provisions. In *New England Motor Carrier Rates*, 9 M. C. C. 737, 738, the Commission said:

" . . . Under Section 216(e) of the Motor Carrier Act, 1935, we are without authority to prescribe, or, in any

manner regulate, rates for intrastate transportation to remove discriminations against interstate commerce or for any other purpose . . . ”

In *Tucker v. Casualty Reciprocal Exchange*, 40 F. Supp. 383, 385, the Court quoted Section 202(b) as support for the statement that:

“ . . . The Motor Carrier Act of 1935 is not only a case where Congress does not assume to occupy the entire and exclusive field of transportation by motor carriers, but on the contrary evidences by explicit language an express intention to leave intrastate commerce by motor carriers to the control of the several States . . . ”

We are deeply concerned to find that the Commission has, in this proceeding, sought to regulate intrastate commerce in the manner described above. The Court will judicially notice the fact that hundreds of motor carriers engaging in interstate commerce, subject to Commission jurisdiction, also engage in intrastate commerce. If the Commission is at liberty, in any case, to require an interstate carrier to make particular intrastate rates or service available to that carrier's interstate passengers or shippers, then the door is open for almost unlimited Federal encroachment in the field of intrastate motor carrier regulation. Such a course is diametrically contrary to the plain and expressed intention of Congress. It is a new and startling doctrine which should be rejected by this Court at the threshold.

IV.

The interstate individual and joint fares prescribed in the Commission order are unreasonably preferential, unjustly discriminatory and unduly prejudicial to particular persons, localities, and descriptions of traffic in Virginia.

Section 216 (d) of the Act reads in part as follows:

“ It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreason-

able preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic, to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

The Commission in *Washington, D. C. Commercial Zone* *supra*, described the Washington, D. C. Commercial Zone in which the operations of motor carriers were made exempt from federal jurisdiction with respect to rate or fare regulation. This zone includes the District of Columbia and points in nearby Maryland and Arlington County and Alexandria, Va.³¹

³¹ "We find that the zone adjacent to and commercially a part of Washington and contiguous municipalities, in which transportation by motor vehicle in interstate or foreign commerce, not under a common control, management, or arrangement for a continuous carriage or shipment to or from a point beyond the zone, is partially exempt under section 203 (b) (8) from regulation, is as follows:

District of Columbia
Garrett Park, Md.
Kensington, Md.

That part of Montgomery County, Md. east of a line extending northward from the Potomac River to the intersection of Conduit Road and Seven Locks Road, and thence northward along Seven Locks Road to the intersection with Weaver Road; and south of a line extending eastward along Weaver Road from the intersection with Seven Locks Road to Orndorf Mill Road, thence eastward along Orndorf Mill Road to Old Georgetown Road, thence southeastward along old Georgetown Road to Grosvenor Lane, thence eastward along Grosvenor Lane to U. S. Highway 240, thence northward along U. S. Highway 240 to Garrett Park Road, thence southeastward along Garrett Park Road to Wheaton Road, thence northeastward along Wheaton Road to old Bladensburg Road, thence southeastward along old Bladensburg Road to the Montgomery County-Prince George's County line.

Chillum, Riverdale, Hyattsville, Bladensburg, Seat Pleasant, and Spaulding districts, Prince George's County, Md.
Alexandria, Va.
Arlington County, Va." (3 M. C. C. 243, 246-247)

The operations of the carriers here involved are in or near the center of this exempt zone and extend a short distance across the Potomac River to Virginia installations in Arlington County, Va. The Virginia Lines operate in Arlington County and Alexandria, ~~Va.~~, and between Arlington County and Alexandria and the District of Columbia. They operate wholly within the exempt area, the only exception being that the Alexandria Line operates a service to and from Fort Belvoir, Va.

The Commission prescribed an $8\frac{1}{3}$ cent token fare for service on the Virginia Lines between the District and the Virginia installations. At the same time, residents of Virginia located no farther from the District than these installations, and who are employed within the District of Columbia, are required under the present fare structure (which has not been altered by the Commission order), to pay a minimum fare of 10 cents for transportation by the same carriers in the same vehicles for the same or less distances.

Further, the Commission order prescribes a $13\frac{1}{3}$ cent commutation fare for through service over the Transit Company and the Virginia Lines and from any place within the District to the Virginia installations. At the same time Virginia residents who are located within the exempt zone area no farther from the District than said installations, are required to pay under the present fare structure of the Virginia Lines and the Transit Company (which fare structure the Commission has not altered), a minimum fare of $18\frac{1}{3}$ cents (10 cents cash fare on the Virginia lines, plus $8\frac{1}{3}$ cents token fare on the Capital Transit Company lines) for transportation by the same carriers in the same vehicles for the same or less distances. And it should not be overlooked that all of these operations are within the Commercial zone as defined by the Commission.

It is, therefore, obvious that if the Commission's order is permitted to become effective the Virginia residents, who are employed in government installations in the District of Columbia, just as are District residents employed in the

government installations in nearby Virginia, will have to pay from 1½ cents to 5 cents higher fares for transportation by the same carriers for the same or less distances, in the same vehicles, than the District residents will have to pay. This creates an unjust discrimination and undue prejudice against the Virginia residents and localities, in violation of Section 216(d) of the Act, hereinabove referred to.

It is clear that the residents in Virginia traveling in the same vehicles and for the same or lesser distances in the same zone should be required to pay no higher level of fares than the District residents pay in traveling between the District and the government installations in nearby Virginia. If there had been testimony presented in the case to justify these differences in the fares paid by the Virginia residents and the District residents, and the Commission had made findings of fact to support these differences and to sustain the lower level of fares which it has prescribed for the District residents, then we could not successfully contend that the fares prescribed by the Commission are unjustly discriminatory and unduly prejudicial against the Virginia residents and localities in violation of Section 216(d) of the Act. But the record contains no evidence to support a prescription by the Commission of a lower fare for government employees residing in the District who work at the Virginia installations, than for government employees residing in Virginia who travel to government installations in the District, or to the government installations in Virginia.

In addition to being discrimination against other interstate commerce as described above, such a discriminatory and prejudicial situation referred to is a burden on intrastate commerce in Virginia in that the Virginia residents using these Virginia bus lines would be required to make up the deficiency in the revenue created by the reduction of the fares which the Commission has ordered for the benefit of the residents of the District who travel to and

from government installations in nearby Virginia. The failure of the Commission to give consideration to the needs of intrastate commerce in Virginia in entering its order in this proceeding is in conflict with the principle enunciated by this Court in *Colorado v. United States*, 271 U. S. 153, where the Court at page 168 of its decision stated:

" . . . The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act of 1920, to establish and maintain adequate service for both. . . . "

This matter was called to the Commission's attention during the hearing and argument and on brief, namely, that if the Commission were to prescribe the lower fares sought by the War and Navy Departments between the District and nearby Virginia installations, the other fares in the same zone would be on a higher basis. In response to that contention the Commission merely found that it would only consider the particular fares complained about in the Secretary of War's letter dated April 27, 1943.³²

³² "Such territory in Virginia as would be added to the present District base zone and the territory in the District now included in the 10-cent base zones of the Virginia Lines, would, with respect to the transportation embraced in this proceeding, be subtracted from those zones of those lines. No change would be made in the present fare zones of the Virginia Lines in respect of service between Virginia residential areas and the Virginia offices." (Emphasis supplied) (R. 847)

"The Virginia Lines are concerned not only about the direct effect of a reduction in the fares here considered, but also about the support that such action would afford for an attack upon other fares, particularly those from and to residential areas in Virginia to and from the District and the Virginia installations." (Emphasis supplied) (R. 848)

* * * * *

"We are unable to accord much weight to apprehensions of respondents that if the District base zone is extended, demands will be made for a similar extension between the District and other

The Commission closed its eyes as to the other fares on the same lines in the same zone, even though it considered this proceeding an "investigation."²³ The definition given by Webster of the word investigate is "to follow up or make research by patient inquiry and observation and examination of facts." The very purpose of an "investigation" is to remove inequalities in rates or fares in a given area. An investigation by the Commission enlarges the Commission's burden in ascertaining *all* the facts and charges it with the duty of exercising special caution in that respect. For example, in *Ex Parte No. MC-9, In re Filing of Contracts by Contract Carriers by Motor Vehicle*, 20 M. C. C. 8, at page 18 the Commission said:

"Investigations on our own motion are contemplated by the act and have long been our practice, particularly where *extensive territories, large groups of carriers, or other issues of general interest are involved.* The magnitude of such investigations, including the present, *only enlarges our burden in ascertaining all the facts and charges us with the duty of exercising special caution in that respect.*" (Emphasis supplied)

The Commission, treating the instant proceeding as an investigation is, therefore, under the duty to investigate all the facts respecting all the interstate fares of these Virginia Lines in the Washington, D. C. Commercial Zone. The fare structure at the present time in the area here in-

points in the vicinity. Each case that comes before us must be decided on its own merits and upon the particular circumstances shown to exist. In the event of a formal proceeding involving other fares, it will be our duty to inquire carefully into the circumstances, but of those circumstances we are not informed on this record. The decision herem must be predicated also upon the facts and circumstances at present known." (R. 848, 849)

²³ The Commission considered this proceeding an "investigation" over our protest. It is our contention that the proceeding is in reality in the nature of a "complaint" case and that if the Commission has jurisdiction, the case should have been referred to a Joint Board for hearing. See Chapter II of this brief which deals with the question of Joint Board procedure.

volved is reasonably uniform and the result of the Commission's order herein, if allowed to become effective, will be to bring about lack of uniformity and inequality in the fare structure, the very opposite result that is contemplated by an "investigation" by the Commission under the Act.

Even if it be assumed that the present fare structure voluntarily maintained by the carriers involved is lacking in uniformity and, therefore, discriminatory and prejudicial, the fares here prescribed by the Commission in no wise improve this situation. At the Commission hearing counsel for the War Department asked one of his witnesses whether an equalizing of the fares would not tend to lessen the load on the Transit Company buses. He used this language:

"Major Ristroph, is it your opinion that if the discrimination in fares was removed so that there was a uniform fare between these installations and the District that the effect of removal of such differences would be to reduce the necessity for the same number of buses to carry the peak hour traffic?" (R. 541)

The same differential that existed in the fare structure at the time counsel asked Major Ristroph this question is perpetuated by the Commission's order herein. In this connection it should not be overlooked that the Regional Committee of the Office of Defense Transportation proposed to eliminate that differential, and the Transit Company and the Virginia Lines agreed. But the War and Navy Departments refused to accept this proposal of the Regional Committee (R. 19). In any event, the Commission has no power to *order* the perpetuation of an unreasonably discriminatory and unduly prejudicial fare or rate structure.

Furthermore, it is a cardinal rule of rate making that in fixing a given rate or fare the Commission should consider the rates or fares applicable in the same or contiguous territories. The Commission has often expressed its recognition of this principle. For example, in the *Lake Cargo Coal*

se, 139 I. C. C. 367, 386, the Commission said in interpreting the Interstate Commerce Act:

" . . . it requires that rates shall not only be reasonable *per se*, but just and reasonable in their relation to other rates on like traffic in the same territory that afford a proper standard of comparison . . . "

See also the Commission's decision in *Fares Between Bergen County, N. J. and New York, N. Y.*, 6 M. C. C. 25. On page 34 of its decision in that case the Commission had the following to say respecting the inequality of fares between the carriers operating in the same territory:

"The evidence is convincing that maintenance of lower fares by some respondents than by others, to and from the same points, on account of slight differences in distance traveled would create a *chaotic* condition. The carrier having the lower fare would get the traffic, forcing down the fares of the other carriers, regardless of the revenue effect." (Emphasis supplied)

At page 35 of its report the Commission further stated:

"There are, however, other tests which may be applied in determining the reasonableness of a rate or fare, such as *comparison with other rates or fares applicable in the same general territory.*" (Emphasis supplied)

The Commission did not follow this well known and established principle in the instant proceeding. The fares between other points in the same area via the same lines were brought to the Commission's attention in the instant proceeding and the Commission gave little or no consideration to the point made.

It is our contention that it was the Commission's duty in this proceeding to investigate and determine the facts respecting fares applicable via the same lines in the same area or zone in reaching its decision. By failing to give consideration to these other fares the Commission refused

to consider one of the most important known factors of rate making. The Commission could not reach an intelligent conclusion without considering these other fares and, therefore, its order is arbitrary and invalid. In any event, the Commission certainly was informed on the record that the fares which the Virginia residents will have to continue to pay for the same or lesser distances than here involved, via the same lines, will be on a substantially higher level than those prescribed from the District to the government installations in Virginia.

We view these variances in fares as a plain case of unreasonable preference, unjust discrimination and undue prejudice to Virginia residents and localities. The Commission order makes no finding of fact, and the record contains no evidence which would support the prescribing of a lesser fare for government employees residing in the District and working at the Pentagon Building than for government employees residing in Virginia and working at government buildings in the District, particularly where the distances involved and the carriers used are the same.

Such unjust discrimination against Virginia residents and localities is not only a violation of Section 216(d) of the Act quoted above, but in our opinion, it amounts to an arbitrary and capricious ruling on the part of the Commission. Certainly the Virginia residents should not be compelled to subsidize these Virginia bus lines for the special benefit of District residents who travel to and from the Virginia installations. The fares of these lines in this commercial zone should be reasonably uniform and free from unjust discrimination and undue prejudice. The Commission's order is, therefore, void in that it is clearly in violation of Section 216(d) of the Act.

V.

The Commission does not have jurisdiction over the street railway system of the Transit Company.

The Commission order under review purports to prescribe fares and joint fares applicable for transportation on the Transit Company's street railway system in the District of Columbia.

In *Omaha & C. B. Street R. Co. v. Inters. Com. Com.*, 230 U. S. 324, this Court held that street electric railways engaged in interstate passenger transportation were not comprehended within the meaning of the word "railroad" as used in Section 1 of the Act, and were therefore not subject to Commission jurisdiction. It would seem that the decision in the *Omaha* case would definitely bar any attempt at Commission regulation of the fares of the Transit Company. However, the Commission has advanced three reasons why it believes it has jurisdiction over this Company, namely: (a) The Transit Company is an interurban line and therefore subject to regulation under the court decision in *United States v. Village of Hubbard*, 266 U. S. 474; (b) Enactments subsequent to the Commission order under review in the *Omaha* case, brought street railroads under the rate jurisdiction of the Commission; and (c) In any event the street railroad operations of the Transit Company are subject to Commission regulation because of their co-mingling with motor carrier operations by the same company. These contentions are considered separately below.

(a) THE TRANSIT COMPANY IS NOT AN INTERURBAN ELECTRIC RAILROAD.

In *United States v. Village of Hubbard, supra*, the Court held that an interurban electric railway line approximately 14.5 miles in length, operating between the cities of Youngstown, Ohio, and Sharon, Pennsylvania, passing through the village of Hubbard, Ohio, is a "railroad" within the mean-

ing of the Act, and hence subject to general Commission regulation.³⁴ In that case, the Court drew a distinction between interurban lines, and street railways which had been held, in the *Omaha* case, not to be "railroads" within the meaning of the Act.

In its original report herein (R. 841), the Commission cites the *Village of Hubbard* decision as authority for Commission regulation of the Transit Company. In so doing, the Commission held, in effect, that the Transit Company is an interurban electric railway.³⁵

The Transit Company's street car system is confined almost entirely to the city limits of the District of Columbia. Within the District the street cars operate on public streets and stop from block to block for the purpose of receiving and discharging passengers. Three of the company's street car lines, however, extend into Maryland (R. 162, 164).

The contention that the Transit Company is an interurban electric railway cannot possibly be based upon that company's electric railway operations within the District of Columbia. The word "interurban" itself denotes a con-

³⁴ The distances from Youngstown and Sharon to Hubbard are 8.75 miles and 7.18 miles, respectively. The Commission had found that the company operating that line "maintains a regular interurban passenger service every half hour between Youngstown and Sharon." *Ohio Rates, Fares and Charges*, 64 I. C. C. 493, 494.

³⁵ In its brief filed in the Court below the Commission said (page 22): ". . . it is clear that the Commission concluded that the Transit Company's electric operations (so far as consisting of the travel to and from the Virginia installations and also Maryland) were interurban . . ." On page 20 of its brief to the Court below, the Commission said: "Down to this point it is plain that the Commission is pointing out that while under the *Omaha* case it is without authority over street electric railways, under the later case (*Village of Hubbard* case) it has authority over interurban roads even though not engaged in transportation of freight . . . it is manifest that it is the Commission's view that, if that part of the company's operations which are electric is to be considered separate (from bus operations), such part is plainly interurban operation within the *Village of Hubbard* case, *supra*. . . ." (We are uncertain whether the Commission continues to take this position in its brief filed with this Court.)

nection *between* cities, not *within* a city.³⁶ It is a pure contradiction in terms to characterize a street car line, performing *intra* urban service, as an "interurban" line. It is plain, also, that the same line cannot be both interurban and urban, even for the purposes of the Act, for the Act itself has drawn a distinction between these terms.³⁷

The Transit Company's street car operations within the District fall squarely within the category of street railways defined in the *Omaha* case and there exempted from Commission jurisdiction. In that case the Court drew a clear distinction between electric lines which were "interurban" and those which were not. There the Court said, at page 336:

"... Street railroads transport passengers from street to street, from ward to ward, from city to suburbs ...

"But it is said that since 1887, when the Act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed.

We are not here dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. . . ."³⁸

But it may be contended that the Transit Company is an "interurban electric railway," subject to regulation under the *Village of Hubbard* case, because it has electric railway lines extending into Maryland and serving several suburban and rural areas. The fares applicable to this suburban

³⁶ "Interurban—going between, or connecting, cities or towns; as, interurban electric railways." (Webster's New International Dictionary, 2nd Ed. Unabridged.)

³⁷ In section 1 (22), the words "street, suburban, or interurban electric railways" are used. The same differentiation is made in section 20a (1).

³⁸ See also, the dissenting opinion of Commissioner Patterson, 256 I. C. C. 769, 787 (R-854).

and rural service are established on a zone basis (R. 840).

The Commission order now under review, prescribing fares and joint fares for transportation on Transit Company street cars were not made applicable to the zone street car service extending into Maryland, but solely to street car service within the District (R. 851). Hence in determining whether the Commission has jurisdiction over the Transit Company street car system, the character of operations beyond the District line, where zone fares are applicable, is wholly immaterial.

But assuming that the character of the street railway service extending into Maryland is material, the Commission has itself held that the predecessor to the Transit Company was a "street railway system" within the meaning of the *Omaha* case, and therefore not subject to Commission jurisdiction. *Depreciation Charges of W. Ry. & E. Co.*, 85 I. C. C. 126, decided in 1923. When that case was decided the Washington Railway & Electric Company, predecessor of the Transit Company, had street car service both within and beyond the District coextensive with the present street car service. In addition, it had street car lines, long since abandoned, extending to Rockville, Maryland, a distance of about 11 miles from the District line; and in another direction, to Laurel, Maryland, a distance of about 14 miles. Yet the Commission, after reviewing the *Omaha* decision, said (85 I. C. C. 126, 129) :

"The facts in the *Omaha* case are similar to those in the present case. The Washington Railway & Electric Company, together with its subsidiaries, operates a 'local' street railway system which hauls no freight and transports passengers principally 'from street to street' within the City of Washington. As an incident to its street-railway business, it conducts a passenger suburban service into Maryland. We believe this transportation system falls within the class of street railways excluded from the act under the decision in the *Omaha* case...."

Needless to say, there has been no change in the facts or circumstances since 1923 which would warrant the Commission in changing its determination then made, that the predecessor of the Transit Company was a "street railway" exempt from Commission regulation. The only substantial change which has taken place since that time has been in the abandonment of the two long street car lines extending to Rockville and Laurel, Maryland. There is thus a much stronger case now for holding this company to be a "street railway" than there was 22 years ago. The Commission has several times said that its "previous decisions relating to the status of the same carrier under a similar exemption provision should not be lightly departed from in the absence of changed conditions . . ." *Salt Lake & U. R. Co.*, 214 I. C. C. 717, 721; *Sacramento N. Ry.*, 208 I. C. C. 203; *Waterloo C. F. & N. Ry.*, 208 I. C. C. 211.

(b) ENACTMENTS SUBSEQUENT TO THE OMAHA CASE DID NOT BRING STREET RAILROADS UNDER THE RATE JURISDICTION OF THE COMMISSION.

In its brief to the Court below the Commission contended that even though the Transit Company is a "street railway", and therefore exempt under the Act as it stood when the *Omaha* case was decided, amendments to the Act enacted since then have brought all street railways, and hence this Company, under the Commission's general jurisdiction.

In making this contention the Commission does not assert that Congress enacted any amendments specifically adding street railways to the list of carriers subject to Commission regulation. But it is said that in 1910 and 1920 Congress enacted certain statutes enlarging the jurisdiction of the Commission in certain other respects, but providing that the enlarged powers shall not apply to electric street railways or interurbans.³⁹ From this the Commission reasons

³⁹ The Act of June 18, 1910, chap. 209, 36 Stat. L. 539, 551, 552, amended section 15(3) of the Act to give the Commission enlarged powers respecting the establishment of through routes and joint

that the specific exception of street railways from the application of these new statutes indicates that Congress understood street railways to be included under the general jurisdiction of the Commission.

To support this reasoning the Commission relies on the *Village of Hubbard case, supra*. In that case, in holding interurban lines subject to Commission jurisdiction, these 1910 and 1920 amendments excepting street railways and interurbans were referred to by the Court as indicating

fares, and provided that "The Commission shall not, however, establish any through route . . . between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character . . ." The other amendments were contained in the Transportation Act, 1920, chap. 91, 41 Stat. L. 456, as follows: Section 422, 41 Stat. L. 488, introduced new section 15a into the Act, dealing with the determination of a fair return, but excluding "(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight . . ." Section 402, amending section 1 of the Act to give the Commission jurisdiction over extensions and abandonments of lines, excludes, by section 1(22), 41 Stat. L. 478, "street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Section 439, which inserts new section 20a into the Act, concerning the issue of securities, excludes, by paragraph 1, 41 Stat. L. 494, "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." Section 204, 41 Stat. L. 460, relating to reimbursement to railroads for deficits during Federal control, excludes "any street or suburban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." Section 209, concerning the guaranty to carriers after the termination of Federal control, excludes, by paragraph (a), 41 Stat. L. 464, "a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power." Section 300, which deals with the Labor Board, excludes by paragraph 1, 41 Stat. L. 469, "a street, interurban, or suburban electric railway not operating as part of a general steam railroad system of transportation."

"that Congress did not intend to deny to the Commission the power to regulate interurban railways in other respects." (266 U. S. 474, 480.)

It is a rule of statutory construction that where the Congress uses broad sweeping language in an act and at a later point in that act expressly excludes certain subjects for *specific purposes*, Congress intended those subjects to be included within the broad language for general purposes.⁴⁰ But it is plain that this rule has no application to a case like the instant one, where street railways were held by the Court to be excluded under the terms of the original Act and Congress thereafter specifically excluded them from subsequently enacted provisions enlarging Commission jurisdiction.⁴¹ In such a case, the specific exclusion is nothing more than a device to make sure that street railways, *already excluded from existing provisions of the Act*, are *also excluded under the new provisions enlarging the Commission's authority in certain respects.*

While Congress might have relied on the *Omaha case*, it chose, out of an abundance of caution, to make express exceptions in these new provisions. This did not operate to vest the Commission with *general jurisdiction over the same carriers*—that would be exactly contrary to what Congress desired. Street railways, having been excluded, by the *Omaha* decision, from the general provisions of the Act, could be brought under general jurisdiction *only by specific provision therefor.*

When Congress desired to bring new classes of companies under Commission jurisdiction it knew how to accomplish this—it made specific provision for the inclusion of such

⁴⁰ Lewis' Sutherland Statutory Construction (2nd ed.) Vol. II. pages 670-672.

⁴¹ When Congress amends or amplifies a general regulatory statute it must be deemed to have known the construction which the courts had placed on the original statutory language. *Cornell Steamboat Co. v. U. S.*, 53 F. Supp. 349, 355, affirmed, 321 U. S. 634.

new classes.⁴² It did so by specific language expressly including the new classes of carriers. After the *Omaha* decision by the United States Supreme Court, Congress was certainly called upon to state in express terms its intention to include "street railways" under the general provisions of the Act, if it had any intention to include them.

The Court in the *Village of Hubbard* case applied the rule of statutory construction upon which the Commission relies. But in that case there was not involved any prior Court decision, such as the *Omaha* case, to throw light on the Congressional intent. The *Village of Hubbard* decision, moreover, draws a clear distinction between interurban lines and street railways and, although referring to the *Omaha* case, does not disapprove or overrule that case, but tacitly approves it.

Up until the instant case the Commission itself has uniformly distinguished between street railways and interurbans and, relying on the *Omaha* case, has consistently held street railways to be excluded from Commission jurisdiction. Since 1915, interurban electric roads have been required to file with the Commission annual reports of their finances and operations. *Jurisdiction over Urban Electric Lines*, 33 I. C. O. 536. But although that decision came down after the 1910 amendments were effective, it continued to recognize the *Omaha* case as the law, and excluded street railways from the annual report requirements. 33 I. C. O. 536, 539.

In *Depreciation Charges of W. Ry. & E. Co., supra*, the Commission held the predecessor of the Transit Company to be a "street railway." This decision, which quoted with approval the *Omaha* case, was decided in 1923, after the

⁴² Express companies, sleeping car companies and pipe line companies were made subject to Commission jurisdiction under the Act of June 29, 1906, 34 Stat. L. 584, Section 1, amending sections 1(1) and (3) of the Interstate Commerce Act. Telegraph, telephone and cable companies were made subject to Commission jurisdiction under the Act of June 18, 1910, 36 Stat. L. 544, Section 7, amending section 1(1) of the Interstate Commerce Act.

1920 amendments were fully effective. In the *Village of Hubbard case, supra*, which was decided in 1925, the Court said, at page 478:

"... the distinction suggested in *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission*, 230 U. S. 324..., between interurban railroads and urban or suburban street railways, has been carefully observed (by the Commission)."

It is a settled rule of construction that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect, and, though not controlling, if acted upon for a number of years, will not be disturbed except for very cogent and persuasive reasons.⁴³

In *United States v. Chicago, N. S. & M. R. Co.*, 288 U. S. 1, the Interstate Commerce Commission, after for years assenting in its annual reports that it did not have jurisdiction over any interurban electric railways, insofar as security regulation under section 20a was concerned, abruptly claimed such jurisdiction over the Chicago, N. S. & M. R. Co., operating between Chicago and Milwaukee. In upholding a District Court decision reversing the Commission, the United States Supreme Court, after calling attention to this long standing record of administrative interpretation, said (page 13):

"With this knowledge of the situation the Commission never, until it requested the Attorney General to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administrative construction of section 20a as applied to this company. Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that

⁴³ See exhaustive annotation in 73 Law Edition, 322, supplemented in 84 Law Edition, 28.

settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. (citing cases)

"The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

The above quoted language by this Court is precisely in point in the instant case. For 35 years the Commission has uniformly held electric street railways to be excluded from its jurisdiction. In 1923 it officially determined, after hearing, that the predecessor to the Transit Company was a street railway not subject to Commission regulation. The Commission has not, up to the time of deciding the instant case, sought to regulate the street railway operations of the Transit Company, or its predecessors, or of any other company whatsoever, in any respect. If there is any ambiguity in the statute relative to Commission jurisdiction over street railways, the Commission has resolved that ambiguity through its uniform administrative interpretation of the Act over a long period of years. As this Court said in *United States v. Chicago, N. S. & M. R. Co., supra*, "at this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

(c) THE CO-MINGLING OF STREET CAR AND BUS OPERATIONS HAS NOT VESTED THE COMMISSION WITH JURISDICTION OVER THE STREET CAR OPERATIONS.

The Commission apparently did not have much confidence in its ruling that electric street railways are now subject to general Commission jurisdiction. So it made a ruling, in the alternative, to the effect that the Transit Company's street car operations had become so "co-mingled" with its bus operations, that regulation of the latter requires regulation of the former (R. 842). In support of this doctrine, the Commission says:

"The situation is analogous to the relation between intrastate and interstate railroad traffic, concerning which the Supreme Court in *Wisconsin Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, said at page 588:

'Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct both.'

The Court will take judicial note of the fact that in the District of Columbia and in all large metropolitan areas, urban transportation systems which, a few years ago, were exclusively street car systems, are now supplemented by bus operations. In most cities, including the District of Columbia, the street car system is still the dominant means of transportation. While the buses and street cars of the Transit Company travel about equal mileage, the street cars produce 62 percent of the revenue (R. 842). While there is certainly no "co-mingling" in the sense used in the *Wisconsin Railroad* case, there is unavoidably a certain amount of integration between the street car and bus operation. Because of this integration between the dominant means of transportation, street cars, and the supplemental newcomer, buses, the Commission proposes to let the tail wag the dog, and to secure jurisdiction of the street car opera-

tion by reason of its claimed authority over the bus operation.

At the outset, this novel theory is objectionable for the same reason that the asserted jurisdiction over street railways is objectionable—it is contrary to the Commission's administrative interpretation of the Act over a long period of time. The Commission first obtained jurisdiction over motor carriers in 1935.⁴⁴ But in the ten years that have transpired since then, this is the first time the Commission has asserted jurisdiction over street railways under the Motor Carrier Act (or any other Act).

If this theory is sustained in the present case there will not be a street car system in the nation which will not come fully under Commission jurisdiction, save in cases where such system has no supplemental bus lines extending across state lines and except where the commercial zone exemption of section 203(b) (8) can be said to apply. As Commissioner Patterson said in his dissenting opinion:

“The action here taken by the majority will constitute a precedent for the assumption, under similar circumstances, of jurisdiction to regulate local and joint fares in connection with street-railway lines serving municipalities throughout the country.” (R. 855.)⁴⁵

The Wisconsin Railroad Commission case, *supra*, relied upon by the Commission is wholly inapposite to the circumstances of this case. In that case there was no question of jurisdiction over the carrier or over a segment of the carrier's line. Here that is the sole question. In the *Wisconsin case* there was a co-mingling of two types of commerce in the same cars operating on the same rails. There is no such co-mingling in the instant case.

⁴⁴ The Motor Carrier Act was approved August 9, 1935, and became Part II of the Interstate Commerce Act. Under the Transportation Act of 1940, approved September 18, 1940, the designation of Part II by the short title “Motor Carrier Act, 1935” for citation purposes, was amended out.

⁴⁵ Commissioner Patterson, who was Chairman of the Commission at the time, presided at the original hearing.

The Court's language in the *Wisconsin case*, relied upon by the Commission, was used to support the statement which immediately preceded, "that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce, and necessary to its efficiency" (257 U. S. 563, 588). The prescription of fares applicable on the Transit Company's street car lines is not "incidental" to the regulation of bus fares. The Commission, had it desired to do so, (assuming its action to be valid in all other respects) could have prescribed fares applicable on the buses but not on the street cars. It did not do this because the result would have been a gross discrimination between passengers riding vehicles subject to Commission jurisdiction and passengers riding vehicles not subject to the Commission's jurisdiction. So the Commission solved the problem by reaching out and assuming jurisdiction over a type of carrier which Congress had not placed under the Commission's authority.

The Commission, in its brief to this Court in the instant case (page 82) cites and quotes *United States v. N. Y. Cent. R. R.*, 272 U. S. 457, as authority for the statement that the co-mingling of the street railway with the motor carrier operations of the Transit Company makes that street railway operation subject to Commission jurisdiction. But it will be noted that the Court quotation relied upon opens with these words: "The Commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part . . ." (Emphasis supplied). In the instant case, the Commission does not have jurisdiction over the Transit Company's street railway "facilities," and therefore *United States v. N. Y. Cent. R. R., supra*, is no authority for concluding that such jurisdiction can be acquired by reason of any co-mingling which may have taken place.

The Commission obtains its authority to regulate bus fares under section 216 of the Act. Section 216(a) provides that it shall be the duty of every "common carrier of passengers by *motor vehicle*" to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges. (Emphasis supplied.) The term "motor vehicle," as defined in section 203(a) (13) of the Act, expressly excludes "any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service." The words "any . . . car operated exclusively on a rail or rails" certainly includes street cars. This is doubly certain when it is noted that the kind of trolley buses excluded from the Act are those "furnishing local passenger transportation similar to street railway service." Here is a clear indication of the Congressional intent that Part II of the Act shall not apply to street railway service or to trolley buses furnishing transportation "similar to street railway service." In the face of that express statutory exemption, there is no warrant for the exercise of jurisdiction over street railways, under Part II, whether by the application of reasoning claimed to be analogous to the *Shreveport* principle, or by any other reasoning.⁴⁶

⁴⁶ In analogous situations the Commission has uniformly recognized that co-mingling or other interrelation between a carrier subject to a specific kind of regulation and a carrier not subject thereto does not justify the Commission in extending such regulation to the latter carrier. Thus, in *Monon Transportation Corp., Common Carrier Registration Appl.*, No. MC-28800, decided by Division 5 on February 13, 1945, it was held that, since Section 206(a) of the Act, exempting carriers operating solely within a state, from certificate regulation, relates only to motor carriers, a motor carrier operating within a single state does not lose its exemption privilege merely because it is a subsidiary of a railroad which operates in more than one state. See, also, *Service Transportation Company Contracts, et al.*, No. MC-C-265, decided by Division 2 on March 5, 1945, where it was held that the exception to Section 203(b)(8), in the case of carriers under a common control, management or arrangement for a continuous carriage to or from a

The Commission, as a body of limited jurisdiction, must find statutory authority for its action. *N. Y. Cent. Secur. Corp. v. U. S.*, 287 U. S. 12. This is doubly true where a conflict with state jurisdiction is involved. As this Court said in *Palmer v. Massachusetts, supra*:

" . . . in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. . . . "

This Court aptly summarized the correct view in *Pennsylvania R. Co. v. Public Utilities Commission*, 298 U. S. 70, when it said, in rejecting a contention that private carriage should be taken into consideration in determining whether railroad transportation, partly by private carrier and partly by common carrier, is subject to Commission regulation under the Act:

"If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

The attempted inroad upon state and local control of street railway lines, implicit in the order under review, unsupported by express statutory authority and founded upon a new and far-reaching doctrine of implied power, should be rejected by this Court as it has rejected similar attempts in the past.

Conclusion.

The five principal points discussed herein are those most directly affecting the interests of the Virginia Commission and state regulatory commissions generally. In addition to these five points, the Commission order is illegal and void

point without the commercial zone, was not applicable to a case where the "common . . . arrangement" was with a private carrier, since private carriers are not subject to general Commission regulation under Part II of the Act.

for several other reasons, namely: (1) The Commission has no power to prescribe joint fares between motor carriers and street railway systems; (2) the Commission has exceeded its authority by requiring motor carriers to establish commutation fares; and (3) the order is not supported by substantial evidence.

These additional points are fully argued in the briefs of other appellees herein. We concur in such argument.

The judgment below should be affirmed.

Respectfully submitted on behalf of the State Corporation Commission of the State of Virginia, appellee, and the National Association of Railroad and Utilities Commissioners, *amicus curiae*,

HENRY E. KETNER,

Attorney for said State Corporation Commission,

FREDERICK G. HAMLEY,

Attorney for said Association.

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